

Mailed 1/10/2000

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In the Matter of: \*

Winslow R. Selvig \*

Claimant \*

v. \*

Jacksonville Shipyards, Inc. \*

Employer/Self-Insurer \*

and \*

North Florida Shipyards, Inc. \*

Employer/Self-Insurer \*

and \*

Arm Insurance Services, \*

CNA Insurance Co. \*

St. Paul Fire & Marine Ins. Co. \*

CIGNA Property & Casualty Co. \*

Travelers Ins. Co./Aetna \*

Carriers/Bondholders \*

and \*

Director, Office of Workers' \*

Compensation Programs, United \*

States Department of Labor \*

Party-in-Interest \*

\*\*\*\*\*

BRB No. 98-1236

Case Nos. 1999-LHC-1676  
1994-LHC-2841/2842

OWCP Nos. 6-10511  
6-154455/154456

APPEARANCES:

David N. Neusner, Esq.

For the Claimant

Robert Townsend, Esq.

For JSI and Arm Insurance

Mary Morgan, Esq.

Richard M. Stoudemire, Esq.

For North Florida Shipyard

V. William Farrington, Jr., Esq.

For JSI and Travelers Insurance/Aetna

Michael C. Crumpler, Esq.  
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For JSI and CNA Insurance

Robert M. Sharp, Esq.  
Kimberly A. Wilson, Esq.  
For JSI and St. Paul Fire &  
Marine Insurance and CIGNA

Thomas A. Grooms, Esq.  
For the Director

BEFORE: **DAVID W. DI NARDI**  
Administrative Law Judge

#### **DECISION AND ORDER ON REMAND - AWARDING BENEFITS**

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on August 3, 1999 in Jacksonville, Florida, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, CNX for an exhibit offered by CNA Insurance, SX for an exhibit offered by St. Paul Insurance, EX for an exhibit offered by North Florida Shipyards and RX for an exhibit offered by Travelers Insurance. This decision is being rendered after having given full consideration to the entire record.

#### **Post-hearing evidence has been admitted as:**

<b>Exhibit No.</b>	<b>Item</b>	<b>Filing Date</b>
ALJ EX 14	This Court's <b>ORDER</b> issued on May 10, 1999	08/04/99
ALJ EX 15	This Court's <b>ORDER</b> issued on May 14, 1999	08/04/99
ALJ EX 16	This Court's <b>ORDER</b> issued on May 24, 1999	08/04/99
ALJ EX 17	Claimant's June 14, 1999 <b>Motion for Joinder</b> filed with Administrative Law Judge Stuart A. Levin	08/04/09

	and relating to Claimant's claim against North Florida Shipyard	
ALJ EX 18	The Motion was granted by Judge Levin on June 24, 1999	08/04/99
ALJ EX 19	Attorney Sharp's June 23, 1999 letter relating to the Section 8(f) petition filed on or about September 12, 1996 by JSI and St. Paul Fire & Marine	08/04/99
ALJ EX 20	Director's July 9, 1999 Notice of Appearance	08/04/99
ALJ EX 21	This Court's <b>ORDER</b> issued on July 7, 1999	08/04/99
ALJ EX 22	This Court's <b>ORDER</b> issued on July 13, 1999	08/04/99
ALJ EX 23	This Court's <b>Notice of Conference Call</b> issued on July 15, 1999	08/04/99
ALJ EX 24	Objection filed by JSI/CNA Insurance to CX 18 (Objection was withdrawn at the hearing)	08/04/99
ALJ EX 25	Request for Official Notice filed by JSI/CNA Insurance Co.	08/04/99
SX 1A	Attorney Wilson's letter filing SX 1 and SX 3 with the Court and sending copies thereof to opposing counsel	08/04/99
CX 29	Attorney Neusner's letter confirm- ing the date for the filing by the parties of their post-hearing briefs	09/07/99
CX 30	Claimant's brief	10/12/99
RX 1	Brief filed on behalf of Travelers Insurance/Aetna	10/12/99
EX 1	Brief on behalf of North Florida Shipyards	10/12/99

CNX 22	Brief on behalf of CNA Insurance Company	10/15/99
SX 4	Brief on behalf of St. Paul Fire & Insurance Company	10/15/99
CX 31	Attorney Neusner's letter filing his	11/08/99
CX 32	Fee Petition	11/08/99
DX 1	Director's brief	11/16/99
CNX 23	Attorney Crumpler's letter requesting that this Court defer ruling on the attorney's fee petition until after issuance of a ruling is made on the <b>Cardillo</b> issue (the request is granted)	12/13/99

The record was closed on December 13, 1999 as no further documents were filed.

### **Stipulations and Issues**

#### **The Claimant and JSI stipulate, and I find:**

1. The Act applies to this proceeding.
2. Claimant and JSI were in an employee-employer relationship at the relevant times.
3. On November 4, 1989, Claimant alleges that he suffered an injury to his right hip in the course and scope of his employment with NFS.
4. The parties attended an informal conference on June 16, 1994.
5. The applicable average weekly wage is \$600.00, according to Claimant, based on his earnings for the pertinent time period with the Employers joined herein.
6. Travelers Insurance Company/now Aetna Insurance Company provided coverage under the Act for JSI from January 1, 1972 through December 31, 1975. St. Paul Fire & Marine Insurance provided such coverage from January 1, 1976 through June 30, 1987.

CNA Insurance Company provided such coverage from July 1, 1986 through June 30, 1989. CIGNA Insurance Company provided such coverage for NFS from September 26, 1989 through June 30, 1992. (TR 6-7; SX 3)

**The unresolved issues in this proceeding are:**

1. Whether Claimant's right hip problems were aggravated, accelerated or exacerbated by his maritime employment with North Florida Shipyards (NFS), which employment ended on November 4, 1989.
2. Whether he gave timely notice of such injury and timely filed for benefits.
3. If so, the nature and extent of Claimant's disability.
4. Claimant's average weekly wage.
5. Responsible Carrier.
6. The applicability of Section 8(f) of the Act.

**PROCEDURAL HISTORY**

The procedural history is best summarized up by the Benefits Review Board in its June 17, 1999 **Decision and Order** wherein the Board states on pages 1 and 2 as follows:

"Claimant filed a claim under the Act for injuries to his right hip, left knee, and feet. Claimant initially began working as a pipefitter in 1955, working for Jacksonville Shipyards from 1967 to August 1989. After leaving Jacksonville Shipyards, claimant accepted a job with employer, North Florida Shipyards, in November 1989, working as a pipefitter for three weeks before being laid off on December 5, 1989. Claimant testified that during the course of his brief stint with employer, he suffered a traumatic injury to his right hip when a hatch cover hit him on the head causing him to strike his right hip on the edge of the hatch as he was climbing to the work site. Tr. at 40-41.

"Claimant suffered a series of medical problems prior to accepting employment with North Florida Shipyards. Claimant testified that while working for Jacksonville Shipyards, he suffered injuries to his fingers, elbow, and left knee, ultimately undergoing left knee surgery in 1972. **See, e.g.** Tr. at 31-32; CX-10. In a procedure unrelated to his work, claimant also had implants inserted into both big toes due to pain associated with gout. Tr. at 33. Claimant had pre-existing osteoarthritis in various joints. Following his layoff from employer, claimant

underwent hip replacement surgery on January 30, 1990. **See, e.g.,** Tr. at 43, 64. He filed a claim for a traumatic injury to the right hip and for repetitive trauma to the left knee on July 9, 1993, and amended his claim on January 12, 1995, to include repetitive trauma injuries to the leg, hip and feet.

"The administrative law judge denied benefits in all claims. Initially, the administrative law judge found the claim for traumatic hip injury barred as untimely. Specifically, the administrative law judge concluded that employer rebutted the presumption of timeliness under Section 20(b) of the Act, 33 U.S.C. §920(b), because claimant did not provide employer with timely notice of the injury as required by Section 12(a) of the Act, 33 U.S.C. §912(a), and because claimant did not file his claim within the time limits specified in Section 13(a) of the Act, 33 U.S.C. §913(a). Decision and Order at 12 - 14. The administrative law judge also found that claimant is not entitled to medical expenses for his hip condition because the testimony that claimant sustained a traumatic injury to his hip is not credible. *Id.* at 15. With regard to the claims for the left knee and feet injuries, the administrative law judge concluded that the claims were timely filed, but nonetheless were not compensable because employer successfully severed the causal nexus between the injuries and claimant's employment with employer. *Id.* at 15 - 16.

"Claimant appeals, contending that the administrative law judge erred in finding the claim for the hip injury to be barred under Sections 12 and 13 of the Act, and in finding none of the injuries work-related. Employer responds, seeking affirmance of the decision below."

In its decision, the Board affirmed my distinguished colleague in all respects except for Claimant's right hip condition, the Board holding as follows on pages 4-6:

"We agree with claimant that the administrative law judge's findings with respect to the hip injury cannot be affirmed. (footnote omitted.) The administrative law judge found the testimony that claimant sustained a traumatic hip injury was not credible. As claimant correctly argues, the administrative law judge did not analyze the evidence under Section 20(a). (footnote omitted.) Although the administrative law judge found that claimant suffered a harm, **i.e.,** a hip condition necessitating hip replacement surgery, Decision and Order at 15 - 16, he did not make a finding as to whether conditions existed at work or an accident occurred which could have caused or aggravated claimant's hip condition. Thus, we cannot determine whether the administrative law judge found invocation of the Section 20(a) presumption established. Consequently, we vacate the findings of the administrative law judge and remand for further consideration of

this issue; on remand, the administrative law judge must address the evidence with respect to the traumatic hip injury in accord with Section 20(a). (footnote omitted.)

"Furthermore, we cannot affirm the administrative law judge's finding that claimant's hip injury was not caused or aggravated by repetitive motion incurred during work for employer. Initially, the administrative law judge provided inconsistent conclusions as to whether the issue was properly before him. The administrative law judge stated on page two of his Decision and Order that "claimant seeks entitlement to compensation for a traumatic injury to his right hip and for repetitive trauma to his right hip," but concluded on pages 14 and 15 of his Decision that "claimant alleged that his hip pain was due to traumatic injury, not to any repetitive work activity." The administrative law judge must clarify on remand whether this issue was properly raised before him. (footnote omitted.)

"If the administrative law judge finds the issue properly raised, we note that the administrative law judge's brief discussion of this matter does not accord with law. The administrative law judge concluded only that claimant's hip injury was not aggravated or accelerated by repetitive work-related trauma, without considering whether the Section 20(a) presumption was invoked. Moreover, the administrative law judge's failure to consider the evidence under Section 20(a) is not harmless because, if his finding is tantamount to an implicit finding that employer rebutted the presumption, it cannot be affirmed. The administrative law judge found that the hip condition was not aggravated or accelerated by repetitive motion because Drs. Pohl and Campbell both attributed claimant's need for hip replacement surgery to his degenerative arthritis, and because his short tenure with employer had no substantial effect on the arthritic condition. Decision and Order at 14. If the administrative law judge intended to find the Section 20(a) presumption rebutted by this determination, he misstated the standard. In order to rebut the presumption, it is insufficient for employer to demonstrate that the employment had "no substantial effect" on his pre-existing condition; rather, employer must affirmatively establish that the employment did not cause, aggravate, accelerate or contribute to claimant's disabling condition. **Bath Iron Works Corp. v. Director, OWCP [Shorette]**, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997); **Sam v. Loffland Bros. Co.**, 19 BRBS 228 (1987). Consequently we vacate the administrative law judge's findings in this regard and remand for the administrative law judge to reconsider the causation issue with respect to the hip injury pursuant to Section 20(a)."

As noted, the Board's decision was issued on June 17, 1999 and Claimant, by motion filed on June 22, 1999, moved that the claims against NFS be consolidated with the claim filed against JSI for

Claimant's November 14, 1972 left knee injury, a claim which was not heard by Judge Levin and which had been forwarded to the Office of Administrative Law Judges by the District Director on April 29, 1999 and which had already been scheduled for hearing. (ALJ EX 1) Judge Levin granted the joinder motion on June 24, 1999 (ALJ EX 18) and the claims against NFS were consolidated for hearing on August 3, 1999 in Jacksonville, Florida. (ALJ EX 10)

The Findings of Fact and Conclusions of Law made by Judge Levin, to the extent not disturbed by the Board, are binding upon the parties as the "Law of the Case," are incorporated herein by reference and as if stated **in extenso** and will be reiterated herein solely as needed for purposes of clarity and to deal with the Board's mandate.

### **Summary of the Evidence**

Winslow R. Selvig ("Claimant" herein), seventy (70) years of age, with an eighth grade education and a GED obtained while serving in the U.S. Air Force (ALJ EX 8) and an employment history of manual labor, worked as a first class pipefitter at the Jacksonville Shipyards ("JSI"), a maritime facility adjacent to the navigable waters of the St. John's River where JSI repaired and overhauled vessels. He began working there in July of 1967 and, after he became a foreman in 1975, he still went on board the vessels daily to perform his maritime duties. Claimant described his work as physically demanding and required that he daily climb forty-to-fifty feet vertical ladders to gain access to the vessel and he then had to descend a similar ladder to reach his work site, while carrying his tool box weighing as much as one hundred pounds. He often had to work on his knees, in tight and confined spaces, underneath and around the pipes, machinery and equipment. Claimant's maritime employment involved stooping, bending, crawling, squatting and working in awkward positions. Claimant's last job at JSI was as an estimator but he still had to go on board the vessels daily to survey the tasks to be done and to estimate the assets of the various departments needed to perform those tasks. This work also involved much more walking and climbing throughout the vessels and all over the shipyard as he now had to go from vessel to vessel to perform his estimating, as opposed to working as a pipefitter on one vessel at a time, Claimant estimating that during an average week as a foreman or estimator or planner he routinely went on/off as many eight or nine vessels and that he spent about 60-70 percent of his work day on his feet and the remainder of his time doing his paperwork. He worked as a planner for about a year in 1986 or 1987 and this work was similar to that of an estimator as it involved the scheduling of work and also required that he daily go on board the vessels. (TR 49-57; ALJ EX 8 at 390-46, ALJ EX 8 (Exhibit B) at 39-46; SX 2 at 5-13)

On October 4, 1972 Claimant was working on the **U.S.S. Corey**, (or the **U.S.S. Gary** (SX 2 at 20)), a Corps of Engineers dredge, and, as he "was walking across the bilge plates," the deck plate tipped and knocked him into the bilges of the vessel, Claimant striking his left knee on a support. He reported the injury to his immediate supervisor. JSI authorized appropriate medical care and Dr. John Q. U. Thompson performed surgery and he "removed some cartilage" from the left knee. Claimant filed a claim for benefits for that injury and the claim was identified by the OWCP as 6-10511 and by the OALJ as 1999-LHC-1676. This is the claim referred to the OALJ on April 29, 1999. (ALJ EX 1) Claimant was working on a so-called Victory or Liberty ship in the late 1960s and, while "carrying some flanges into the engine room . . . (down) a pretty steep ladder, his "heel hooked and (he) tripped, went down" about four feet of stairs; he "broke (his) little finger on (his) left hand" because he "had to hang onto the flanges for fear of dropping on some people below." He did not lose any time from work as medical personnel "put a splint on it" and he returned to work. He could not recall any other lost time injuries while working at JSI, although he did sustain injuries while working for his prior employers. (ALJ EX 8 at 10-13, 51-55; SX 2 at 20-22; TR 57-61)

Claimant left JSI on August 23 or 25, 1989 as he was one of the first fifteen employees "laid off when they started shutting the plant down" and one week later he went to work for about six or seven or eight weeks for the CISCO Corporation, a temporary labor company located in Jacksonville, as "a job superintendent out of town primarily," at an orange juice facility in Sarasota. He was not injured on that job and he left Cisco because the "superintendent of North Florida Shipyards (NFS) called and asked" him if he wanted to go to work for them as a pipe foreman. Claimant agreed to the offer by "Danny" and he went to work at NFS on November 15, 1989. (CNX 8 at 3) Sometime within the next 7 - 10 days, <sup>1</sup>Claimant "was climbing into a hatch to go down into No. 3 pump room on the **USS Forrestal**" when "the hatch (cowling) came and hit (him) on the head and knocked (him) into the knife edge of the hatch injuring (his) right hip." Claimant, who had not had any right hip problems prior to that incident, did not seek medical attention "because (he) thought it was a bruise." As noted by the Board, Claimant did advise one of his supervisors, Mr. Ballard, of "the incident on the day it happened." **Selvig, Decision and Order**, page 3, fn 1. Claimant was laid-off by NFS after three weeks or so on December 5, 1989, and on December 28, 1989, Claimant went to see Dr. Gaillard, his family doctor, and the doctor referred him to Dr. Robert Pohl, an orthopedic surgeon. The doctor, finding a chip in

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<sup>1</sup>As Claimant, due to the passage of time, was vague as to the date of this injury, I have selected November 23, 1989 as the date of Claimant's traumatic right hip injury.

his right hip, performed a right hip replacement on January 30, 1990. Claimant also had left knee arthroscopic surgery and then a total replacement performed by Dr. Pohl on November 6, 1990. Claimant's medications at that time included Vasotec and Calan, blood pressure medications, DiaBeta for his diabetes and Allopurinol for a gout condition. (ALJ EX 8 at 13-23, 51, 56-59; SX 2 at 13-16, 22-25; TR 61-67)

As noted, Claimant reported the right hip incident "to the guy (he) was working for," Mr. Ballard, Claimant testifying, "I told him about it as a matter of information in case something came up. I thought it was just a bruise at the time, but it just got progressively worse" and "eventually" he sought treatment therefor from Dr. Gaillard and then Dr. Pohl. (ALJ EX 8 at 24-26)

Claimant testified the left knee surgery did not alleviate his constant knee pain and his knee "was never the same" after that 1972 injury. Fluid constantly accumulated in the knee and every four to six weeks he had to go to the doctor to have his knee drained. The constant left knee pain affected his ability to perform his assigned tasks at JSI and NFS and Claimant's nickname was "Hoppy," a reference to his limping because of the left knee and feet problems. Claimant's work, especially the extensive walking and climbing, aggravated these pre-existing problems. He has not worked since leaving NFS in December of 1989 because of his inability to climb ladders. Dr. Pohl has told Claimant to learn to live with the pain. He must take 2 Vicodin in the morning so that he can get going because of the constant pain. He cannot sleep in a bed but must sleep in a recliner because of his hip, shoulder, knee and feet problems. He can only walk about thirty-to-forty feet and then he must stop and rest because he is "dead-tired." He wears a right foot brace, uses an electric cart to get around and uses a cane when he goes shopping. He sleeps less than four hours each night because the constant pain awakens him. He takes Xanax to help him sleep and he leads a mostly sedentary life as any exertion aggravates his multiple medical problems. (TR 66-78)

Claimant cannot return to work anywhere because of his left knee total arthotomy and his right hip total replacement because those medical procedures prevent him from climbing up/down those steep vertical ladders on the vessels. Claimant's medical records reflect that he complained to Dr. Pohl on July 26, 1989 about increased pain in his left knee (CNX 1, page 54) and about hip problems on August 23, 1989 after he had been laid-off by JSI. (CNX 1, page 53)

Claimant went to see Dr. Pohl on May 25, 1990 because his left knee "hurt like hell." Arthroscopic surgery on June 26, 1990 provided little relief and he had a total left knee replacement on November 6, 1990. He experienced sixteen (16) weeks of

"excruciating pain" and he applied for SSA disability benefits in January of 1990 and that agency, declaring him to be totally disabled for all work, awarded him those benefits later in the year. Claimant admitted that he filed no claims against JSI in 1990 or 1991 or 1992 and that his first claim for his alleged repetitive trauma to the left knee was filed on July 1, 1993, Claimant attributing the delay to the fact that no doctor prior to that time had ever told him about the concept of repetitive trauma and that his problems may be work-related. He just took his injuries as hazards of the job and he learned how to live and work with his constant knee and feet problems. He learned later on about the degenerative arthritis in his feet and until that time his problems were being treated as the "gout." He had a left toe removed in 1992 and, after a 1994 diagnosis of osteomyelitis, he had one of his little toes amputated. (TR 78-88)

Claimant has been treated for diabetic neuropathy since the 1980s, as well as for arteriosclerotic vein problems, for which Dr. Wernow performed angioplasty in the late 1970's or early 1980's. (ALJ EX 8 at 36) Claimant's work at NFS aggravated his knee, foot and hip problems and, at the end of the day, his knee, feet and hip pain worsened. Claimant's total left knee replacement was paid by Connecticut General, the Claimant's group hospital carrier. As far as Claimant is concerned, there are no unpaid medical bills for his knee or hip problems. He went to work at NFS believing that it would be a permanent job until he retired at age 65. He was given, and he passed, a strenuous agility test by the NFS Safety Department before they hired him on November 15, 1989. Claimant's right hip problems began with that traumatic incident at NFS and the symptoms progressively worsened after that, resulting in the total hip replacement on January 30, 1990. His last day of work at NFS was on December 5, 1989. Claimant's only hobby is playing golf and he cannot play as much as he did in the past, and he now must use a golf cart on those few occasions he goes out to play golf. (TR 88-100; SX 2 at 31-33; CNX 8 at 4-6)

This record contains voluminous reports relating to Claimant's medical care and treatment since 1972 and, in view of their importance herein and for the benefit of reviewing authorities, these reports will be extensively summarized.

Dr. Q. V. Thompson, an orthopedic surgeon, examined Claimant at the request of Aetna Life and Casualty and the doctor sent the following letter on October 17, 1972 to the Carrier (EX 10):

I examined this 43 year old man on 10-10-72. He complained of painful left knee since he struck it on a sharp ledge when he fell in the bilge of a ship on 10-4-72. The soreness became painful after several days with some swelling.

Past history was that he had a sore left knee some 10 years ago but this had given no intervening difficulty.

Examination showed some thickening and marked tenderness on the lateral aspect of the left knee in the region of the head of the fibula. There was practically no excess fluid in the knee joint. X-rays by Dr. Rizk showed a normal knee.

I felt he might have some post-traumatic synovitis. Injected steroid suspension in the knee.

Two days later he was still having pain laterally in the region of the head of the fibula but additional x-rays were made and these showed no boney damage to the head of the fibula. On 10-17-72 he was much better and is to try return to work on 10-18-72. I believe that he has a post-traumatic periosteitis from the direct blow he suffered. I think this will clear up fairly readily without any very special treatment, according to the doctor.

Claimant underwent left knee lateral meniscectomy on November 29, 1972. (**Id.**; CX 11)

Dr. Thompson sent the following letter on April 20, 1973 to the Carrier (**Id.**):

This 43 year old man had excision of torn lateral meniscus of the left knee on 11-29-72. He made a satisfactory post-operative recovery except for some tendency to persistent low grade synovitis.

He did return to work on 2-20-73. When most recently seen, on 4-16-73, there was a small effusion but there was no tenderness and no local increase in temperature. He mentioned that there was some tendency for his knee to swell after an extra hard day's work but it subsided after a day or two.

I believe that this man has reached maximum medical improvement. There is 10% permanent partial impairment of the left lower extremity.

Dr. Thompson saw Claimant thereafter and sent this letter to the Carrier (CX 10):

This 43 year old man was seen at my office on 8-30-73 with marked swelling of his left knee of several days duration and rather sudden onset of the swelling. He had no recent injury. As you may recall from your records, he hurt his knee at work last fall and had knee surgery on 11-29-72 (lateral meniscetomy).

The examination showed marked synovial distension. This was

relieved by arthrocentesis. He was given an appointment to re-examine if he was still having this some (SIC) sort of difficulty, but he did not return so apparently he is back at the level of when I had discharged him from active follow up last April, according to Dr. Thompson.

Dr. Robert J. Grube, Jr., an orthopedic surgeon, examined Claimant on January 19, 1990 at the request of Dr. Pohl for a second opinion and the doctor states as follows in his letter to Dr. Pohl (CX 5):

Mr. Selvig presents with a long history of multiple joint involvement with degenerative arthritis. Since December he has had a significant flare-up of right hip pain. He has been on antiinflammatory to no avail. He has been at home resting for about a month and still has daily pain. He is unable to tie his shoe.

On my evaluation the discomfort is well localized in the inguinal region to deep pressure. Internal rotation of his hip recreates significant pain. His straight leg test is unremarkable other than some hamstring tightness. He has no flexion contractures. Leg lengths are equal. The deep veins are nontender.

X-RAY: X-rays of his hips were reviewed. There are significant bilateral degenerative changes with the right being worse than the left.

IMPRESSION: Significant degenerative joint disease of the right hip.

PLAN: 1. This patient has been unresponsive to conservative care. His pain is daily and significantly disabling.  
2. Overall his only alternative at this point is a Total Hip Arthroplasty and I agree with that proposed surgery.

Dr. Grube sent the following letter to Dr. Pohl on October 18, 1990 (CX 5):

Mr. Selvig presents with a long history of left knee discomfort. He has a chronic effusion. He has been unresponsive to Arthroscopy and local injection, antiinflammatory and exercise.

His x-ray shows some moderate to near severe degenerative change. This is secondary to his trauma.

Overall at this point I agree that a Total Knee Arthroplasty is in his best interest. He is well informed relative to this procedure and his alternatives, according to Dr. Grube.

Dr. Gaillard referred Claimant to Dr. Robert G. Ellison, Jr., a vascular surgeon, and the doctor, by letter to Dr. Gaillard on June 21, 1995, reported that an "arterial doppler signifies significant arterial occlusive disease" and recommended angiography to "see if the patient has reconstructible disease" of the right lower extremity. (CX 6) One week later Dr. Ellison reported that the "angiogram showed significant popliteal tibial disease" and recommended "supra-geniculate femoral popliteal bypass with an intraoperative balloon dilatation of his distal popliteal artery." (Id.) Claimant's pre-op clearance tests showed, *inter alia*, chronic obstructive lung disease and the recommended surgery took place on July 13, 1995. The July 15, 1995 discharge diagnosis was a "(d)iabetic with severe arterial occlusive disease with disabling discomfort of the right lower extremity associated with very poor run off." (Id.) In his letter of July 19, 1995 Dr. Ellison recommended followup of Claimant's abnormal chest x-ray as there is a "small nodular density in the right lung which could be a lung nodule." As of August 23, 1995, Claimant was "doing very well." (Id.)

Sheldon F. Wernow, DPM, a podiatrist, treated Claimant on referral from Dr. Gaillard for his left foot problems and Dr. Wernow's records, in evidence as CX 14, relate to his treatment of Claimant between December 8, 1992 and June 14, 1994. Claimant underwent amputation of the 2nd toe, left foot, on July 26, 1993 because of the ulcer and cellulitis in that toe. (CX 14) Claimant's December 15, 1992 MRI of the left foot showed osteomyelitis. (Id.)

Claimant underwent thirty-five (35) hyperbaric treatments between September 19, 1994 and January 27, 1995 to treat a Meleney's ulcer on the dorsum of his left foot and Dr. Thomas M. Bozzuto reports as follows in his report (CX 12):

#### COURSE OF THERAPY:

The patient underwent 35 hyperbaric oxygen treatments. He was debrided several times. This patient had originally been treated by us back in the fall of 1984 (SIC) and he re-developed a new plantar ulcer which is the reason for him returning. On 12-02-94 he was debrided with sedation and he was getting IV antibiotics at that time. He had several debridements in the department. Bone scan reports from December were inconclusive. Questionable osteo of the fifth metatarsal. Callous was debrided again on 12-19-94. He had persistent tenderness on the ball of his foot and an x-ray of the foot was negative for pathologic fracture. Again, on 12-29-94 callous fibrous tissue was debrided to bleeding tissue and packed with fine mesh gauze and a pressure dressing. He was fitted an orthodic shoe which would be ready two weeks from then. He was again debrided 1-05-95 and the wound showed signs of improvement. He had decided after his treatment on 1-27-95 that he wanted to take a week off because he had been coming every day for a

prolonged period of time and on 2-15-95 I contacted his wife and asked her to let us know whether he was going to come back for any further treatments, and the call was later returned and said that he was going to try some different form of therapy and would not returning (SIC) to hyperbarics.

As of October 19, 1994, Dr. Bozzuto had reported as follows (Id.):

COURSE OF THERAPY:

The patient underwent 13 consecutive hyperbaric treatments after which Dr. Pohl did a skin graft to the open area where the amputation site was on the left foot. He was discharged 10/19/94 after his tenth postoperative treatment and had just a small of area of partial skin graft loss. He was scheduled to see Dr. Pohl the following day and we will recheck him in hyperbarics in one week.

Dr. Gaillard referred Claimant to the Clinic for Pulmonary and Infectious diseases and Dr. P. Andrew Coley, Jr., reported as follows (CX 13):

Reason for Evaluation: Left foot ulcer

HISTORY: Mr. Selvig is a 65-year-old white male who presents to us for evaluation of a left foot ulcer. He is a diabetic who is controlled on oral hyperglycemics. He is being followed currently by Dr. Gaillard as his primary physician and Dr. Robert Pohl as his orthopedic physician. He recently underwent amputation of the big toe on the left foot, followed by amputation of the rest of the toes on the left foot for osteomyelitis. He healed well and was doing fairly well, and then developed an opening over the incision over the little toe on the left foot. That started to open up and then he developed an ulcer on the bottom of the left foot around the ball of the foot. Dr. Pohl took a culture on 11/28 and the results were just returned today. He has two organisms, one is a Group D Streptococcus, Enterococcus and also he grew an Enterobacter cloacae. He has been on Rocephin daily and has an INT needle in place. He noticed he has had some improvement, although he still has a lot of soreness in the foot. He goes daily to the hyperbaric chamber at Baptist Hospital.

He has had an angioplasty done on both legs earlier this summer which revealed that the left leg has better large vessel profusion than the right. He has had a long history of neuropathy in both feet. As a child he often had frostbite on his toes and fingers. He was a smoker but he quit in 1966.

PAST MEDICAL HISTORY: He has had multiple surgeries over the years, most of them have been orthopedic. He has had his right hip

replaced. His knees have been operated on 3 times. He has surgery on his left thumb, his left elbow, his right foot. He has had his gallbladder and appendix removed, as well as 2 hernia operations. He has a history of gout and also some hypertension. He is also, as mentioned, has diabetes Type II...

Dr. Coley gave the following assessment and recommended treatment plan (**Id.**):

ASSESSMENT:       1.    Diabetic foot ulcer.   R/O osteomyelitis.  
                    2.    S/P recent amputation of the toes on the left  
                            foot.  
                    3.    Hx diabetes mellitus Type II.  
                    4.    Hypertension.  
                    5.    Hx gout.  
                    6.    Hx multiple orthopedic surgeries, including  
                            right hip replacement and knee replacement.

PLAN: Based on his culture findings, we will add Vancomycin to his regimen. We will continue Rocephin 2 grams IV daily, and add Vancomycin 1.25 grams q12H. With that we will get weekly CBCs, SMAC, sed rate and check a peak and trough level on the Vancomycin in a couple of days and then continue that weekly. We will also obtain an MRI of the left foot, looking for underlying osteomyelitis. We will see him back in 10 to 14 days.

Dr. Coley sent the following letter to Dr. Gaillard on December 2, 1994 (**Id.**):

Thank you for referring this very applicable (SIC) gentleman who has had quite a severe problem with his left foot. We were able to obtain his most recent culture which revealed that he grew out a Group D Streptococcus along with an Enterobacter cloacae. Therefore we have taken the liberty of adding Vancomycin 1.25 grams q12 hours to the current dose of Rocephin he has been getting. We will obtain an MRI of the foot, looking for further evidence of osteomyelitis.

We will be seeing him back in 10 to 14 days, and we look forward to working with you in regards to his case, according to the doctor.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

#### **Additional Findings of Fact and Conclusions of Law**

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from

it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards, supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions

existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita, supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier, supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. *See, e.g., Noble Drilling Company v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. *See Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *See, e.g., Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

Employers contend that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that Claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of

physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he/she experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See, e.g., Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**,

29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employers dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to the employers to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his right hip condition, resulted from working conditions and/or a work-related injury sustained at the Employers' facility. The Employers have introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

## **Injury**

The term "injury" means accidental injury or death arising out

of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955); **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath**

**Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

As noted above, Claimant accepted the offer of "Danny" to work at NFS and he began work there on November 15, 1989, Claimant testifying that he accepted an offer of permanent employment and that he intended to remain there until he would be able to retire at age 65, or six years after he began working there. Claimant injured his right hip when a "hatch (cowling) came down, hit (him) on the hard hat, drove it down on top of (his) head and knocked (his) hip as (he) was inside just about to get" into the number three pump. Claimant minimized that injury, believing it to be only "a bruise" which would naturally heal itself in a few days. Claimant continued to perform his physically demanding duties at NFS, although his right hip "hurt like hell" because he was climbing ladders everyday, up and down." (SX 2 at 10-19)

Claimant attributes his right hip problems to his physically demanding maritime work and he is sure "it had a lot to do with climbing over twenty some years of service up and down the tanks, up and down masts, up and down gangways, in and out of tanks, crawling around in (vessel) bottoms, wing tanks, crawling around (and on) aircraft carriers, whatever. Working in pump rooms, in and out of bilges, up and down. You know, even after (he) became a leaderman, it was still necessary to do these things." (SX 2 at 36)

While at NFS Claimant also had to go on board the vessels daily and he continued to work in tight and confined spaces and sometimes had to crawl to get to his work site, Claimant remarking that his work also involved kneeling, bending, stooping or squatting. He continued to perform his duties after the right hip injury - which occurred about half-way through his three weeks at NFS - "but it wasn't very damn pleasant, because when (he would) crawl on ladders, then (he would) have to stop at every landing and take a break because it (his right hip) was sore," Claimant treating the hip problem as "a bruise and would take care of itself in a week or so." (SX 2 at 39-40)

With reference to his shipyard work, Claimant testified, "Some of these ladders ... are 60, 80 feet high, straight up and down, you know, and when you take (his) size at that time, 204, 235, 240 pounds, climbing up and down those kind of ladders, you're putting a lot of strain on a lot of joints." Claimant's left knee has continued to hurt him over the years, has never returned to the **status quo ante** he enjoyed on November 4, 1972 and, as of the time of his July 14, 1999 deposition (SX 2), he was still experiencing swelling in that knee. However, he rationalized his chronic left knee problems thusly: "It's like anything else. After you get accustomed to hurting all the time and you know there isn't a damn thing you can do about it, you just accept the fact that it hurts."

Claimant's left knee continued to bother him after he left JSI and went to work for NFS. (SX 2 at 43, 49-51)

Claimant attributed his current overall medical condition to his physically demanding work with these words: "I just know that the more I climbed, the more I hurt, you know, as time went by." Even prolonged standing on the ground affected his feet and knees, Claimant remarking that he was unable to make a comparison between his work at JSI and NFS. (SX 2 at 46-47)

Dr. Robert O. Pohl alone has treated Claimant's right hip problems and he last saw the doctor several months prior to the July 14, 1999 deposition for the "hip pain" but the doctor advised Claimant that "there isn't anything he could do about it" and that Claimant will just have to learn to live with that pain. (SX 2 at 48-49)

Claimant continued to go on board the vessels daily until he left JSI on August 23, or 25, 1989. Dr. Thompson treated Claimant's left knee problems for several years until his retirement and Dr. Pohl has treated Claimant's knee and hip problems since he took over Claimant's care for his orthopedic problems. While Claimant's medical records do not show visits to the doctor for a span of fifteen (15) years or so, Claimant remarked, "But that doesn't mean that it didn't hurt." (SX 2 at 55-56) Claimant is certain that he went on board vessels at JSI during his last thirty (30) days before his layoff, because "if (he) didn't have anything to do for 30 days, (he) would have been assigned somewhere else." (SX 2 at 60)

Dr. Pohl, a Board-Certified orthopedic surgeon, has been Claimant's primary treating orthopedist since May 15, 1989 for his various orthopedic problems and the doctor's records relating to his treatment of the Claimant total 101 pages and are in evidence as CX 4.

Claimant's multiple orthopedic problems are detailed in the May 15, 1989 report of Dr. Pohl to Dr. Philip P. Gaillard, Claimant's family doctor. (CX 4)

Claimant's total left knee arthroplasty was performed by Dr. Pohl on November 6, 1990 and the final diagnoses were (CX 4):

1. Osteoarthritis, left knee.
2. Arteriosclerotic heart disease.
3. Hypertension.

Claimant had previously undergone on June 26, 1990 abrasion arthroplasty portion of medial femoral condyle and removal of loose body of right (SIC) knee. The post-operative diagnoses were (CX

4):

1. Osteoarthritis involving the medial compartment and patellofemoral articulation, right (SIC) knee.
2. Loose body, right (SIC) knee.

Claimant was hospitalized on January 30, 1990 "by Dr. Pohl for severe degenerative arthritis of the right hip for a hip replacement." According to the admitting report, "the patient has been in severe pain and unable to walk for several weeks and was eventually referred to Dr. Pohl for treatment of this condition," and Claimant's past medical history is "significant in that the patient does have a history of coronary artery disease diagnosed by catheterization approximately 1 1/2 years ago. It was described as mild to moderate coronary artery disease. The patient has been treated with Calan for this condition and has under(gone) cardiac rehab. The patient's cardiac disease is stable... The patient also has hypertension and takes Calan-SR 240 one a day and a Vasatec a day for this. He also has diabetes mellitus and takes Diabeta 2.5 mg. a day."

The admitting diagnoses by Dr. Gaillard were (CX 4):

1. Severe degenerative arthritis of the right hip.
2. Coronary artery disease, stable.
3. Hypertension, well controlled.
4. Diabetes, well controlled.
5. Status post appendectomy, cholecystectomy and bilateral hernia repairs.

Dr. Pohl's impressions were (CX 4):

1. Osteoarthritis of the right hip.
2. History of hypertension.
3. Past history of cholecystectomy, arthrotomy elbow, arthrotomy of knee and arthroplasty of the feet.

The surgery was performed and Dr. Pohl's final diagnoses were (CX 4):

1. Osteoarthritis of the right hip.
2. Hypertension.
3. Diabetes mellitus.

Claimant's medical records also relate to Dr. Pohl's treatment of Claimant's feet and elbow problems. (CX 4)

Dr. Pohl requested authorization for the total right hip replacement by health insurance form dated January 26, 1990. While

the form was submitted to the Employer's group hospital insurance company, I note that the section relating to the etiology of the problem, *i.e.*, "Is the present condition the result of an accident or injury on the job?," has been left blank. I also note a similar absence on the form dated March 6, 1990. (CX 4) Dr. Pohl has kept Claimant out of work as totally disabled and he opined that Claimant reached maximum medical improvement on November 6, 1991 as "a maximum medical improvement date one year after a total joint replacement is a reasonable period of rehabilitation." (CX 4)

Dr. Pohl's first deposition took place on January 11, 1995 (CX 1) and Dr. Pohl, who had been an orthopedic surgeon for eighteen (18) years as of that date and who first saw Claimant on May 15, 1989 for his right elbow, left knee, right knee and his feet, testified that Claimant gave a history report of that 1972 shipyard injury and for which Dr. Thompson performed a lateral meniscectomy of the left knee eight years earlier, that Claimant had also had a toe implant of the left foot at that time, that the diagnoses were "degenerative arthritis of his right elbow, left knee patella femoral arthritis and lateral compartment arthritis, right knee patella femoral arthritis" and "mild DJD of the femoral tibial compartment." Arthroscopic left knee surgery was performed on June 26, 1990 and he underwent a total left knee replacement on November 6, 1990 because Claimant "did not get good relief from his arthroscopic surgery." Physical therapy was recommended. Claimant remained out of work and that injury had resulted in a "twenty percent permanent physical impairment (of the) left lower extremity as a result of the total knee replacement," an impairment "probably" based on the AMA **Guidelines**. (CX 1 at 4-11)

According to the doctor, Claimant's 1972 traumatic injury to the left knee and subsequent meniscectomy have "contribut(ed) to the development of the osleoarthritis in his left knee" because of the damage to the cartilage in that knee. Dr. Pohl agreed that repetitive trauma or microtrauma can increase the speed of onset of osteoarthritis in the knee because a damaged knee in which cartilage has been removed is more vulnerable to microtrauma than a healthy knee, that Claimant's physically demanding shipyard work for twenty-two years, *i.e.*, the "repetitive trauma," "was a factor in the development of osteoarthritis in his left knee," a condition which had become so severe as to require a total left knee replacement. (CX 1 at 12-14)

With reference to Claimant's right hip problems, Dr. Pohl received complaints of right hip pain on January 11, 1990, "pain (which had been" present for a while," the doctor opining that a total hip replacement was recommended because Claimant "had been on some anti-inflammatory medication which hadn't helped him and he wanted to get rid of the hip pain. After Dr. Pohl was given a hypothetical question based on Claimant's November 23, 1989

traumatic right hip injury at NFS and the objective findings reported by the doctor on January 11, 1990, Dr. Pohl replied as follows on page 17, lines 18-23 (Emphasis Added):

**I have an opinion. If he had a substantial increase in symptoms of pain in his right hip or the onset of pain in his right hip following that accident, then it would have contributed to the condition which I ultimately treated with a total hip replacement.**

Dr. Pohl further testified that Claimant did not complain of right hip pain prior to that January 11, 1990 examination, that Claimant had reached maximum medical improvement with reference to his right hip arthroplasty and that Claimant had an impairment of "twenty percent (of the) right lower extremity as a result of (the) total hip arthroplasty." (CX 1 at 14-18, 24-26)

With reference to Claimant's bilateral foot problems, Dr. Pohl opined that Claimant "has diabetic neuropathy in his feet," that he has "moderately severe" arthritis in both feet, that he underwent an arthroplasty of the left big toe in the early 1980s, that Claimant subsequently developed an ulcer on the bottom of the left foot and that he had diagnosed Charcot disease<sup>2</sup> as of June 16, 1994. Dr. Pohl further opined that Claimant's repetitive climbing, walking or standing on concrete and metal surfaces, *i.e.*, the repetitive or microtrauma, would have "hastened and aggravated" the diabetic neuropathy, a condition from which Claimant suffered since at least the early 1980s, based upon the objective findings Dr. Pohl reported on May 15, 1989. (CX 4) Furthermore, the repetitive trauma contributed to the degenerative arthritis in his feet. Claimant is "definitely at an end point" with reference to his bilateral feet problems but the doctor cautioned, "If the ulcer doesn't heal, he'll probably lose his foot." Claimant "will not be able to return to that employment" as a shipyard pipefitter and "won't be able to return to gainful employment" as "he is to be at bedrest, couch or chair rest with minimal contact of his foot to the floor. And when he is walking, he has a protective brace that he is to wear." (CX 1 at 19-24)

According to Dr. Pohl, Claimant's left knee replacement was not warranted as of the May 15, 1989 office examination but was warranted after the June 26, 1990 arthroscopic surgery (1) failed to provide the anticipated relief and (2) confirmed the significant

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<sup>2</sup>"A condition that is characterized by a fairly proliferative type of osteoarthritis of the joints, and in this case, the foot, which develops as a result of impaired sensory and proprioceptive feedback from the involved part, in this case the foot." (CX 1 at 20)

degenerative changes. (CX 1 at 27-29) According to Dr. M. M. Carter's note, Claimant's December 29, 1989 CAT scan showed "moderate to severe superior and lateral narrowing of the right hip joint with adjacent sclerosis compatible with degenerative disease," Dr. Pohl agreeing that Claimant had a significant degenerative problem with his right hip which could be characterized as severe, the doctor again pointing out that the right hip symptoms were reported to him for the first time on January 11, 1990. (CX 1 at 30-32)

Dr. Pohl further opined that Claimant's climbing up/down vertical ladders as high as sixty feet at North Florida Shipyards would aggravate his left knee problems and hasten the need for a total knee replacement, resulting in his left knee impairment, although the doctor was unable to quantify the extent to which such impairment was caused by Claimant's work at NFS. (CX 1 at 35-37) Dr. Pohl further opined that Claimant's alleged traumatic right hip injury at NFS would have "aggravated his right hip osteoarthritis." Claimant cannot return to any work because "(h)e can't walk or stand" and "requires almost daily medical treatment from somebody, predominantly." While Claimant's left knee problems "would not preclude him from going to work if that were really the only thing wrong with him ... it would preclude him from anything other than probably a light duty type job or a sedentary job." Moreover, Claimant's "foot problems contribute significantly to his inability to return to work," although he would be able to return to some work if he only had foot problems. Noteworthy is the doctor's opinion that Claimant's repetitive trauma at the shipyard would aggravate his foot problems without him knowing it, the doctor remarking, "that's probably what happened" because the "onset of these Charcot deformities and arthritises is insidious and there may or may not be much in the way of pain to herald their presence. There may not be any injury." (CX 1 at 38-43)

According to the doctor, "there was a substantial increase in (right hip) pain in the several months preceding the January 11, 1990 visit," the doctor further testifying on page 45, lines 14-18 as follows (Emphasis Added):

**Well, the alleged injury, if it resulted in pain in his hip and it was the same thing that I saw him for on 1/11/90, then I would have to say that the injury was a significant part.**

I note that the doctor rejected the suggestion that he was speculating with these words (Emphasis Added):

**It's hardly speculation if I've been told that there was an accident and he injured his hip and he complained of pain in his hip after the accident.**

(CX 1 at 45-46)

There then followed a series of questions to the doctor based upon a work history at NFS of from one-to-three months and, as Claimant worked at NFS for only three weeks, the answers will be disregarded as based upon a faulty premise and a premise which omitted completely any reference to Claimant's physically-demanding shipyard work, **i.e.**, the repetitive trauma, repetitive trauma at JSI from July of 1967 to August 23 or 25, 1989. (CX 1 at 47-49)

Claimant's correct work history was discussed at Dr. Pohl's supplemental deposition on January 31, 1995, the transcript of which is in evidence as CX 2. This testimony will now be summarized at great length because of its importance herein.

The parties re-deposed Dr. Pohl on January 31, 1995, the transcript of which is in evidence as ALJ EX 8 (Exhibit C), and the purpose of the supplemental deposition was to give the doctor the opportunity to clarify his opinions relating to Claimant's right hip problems based upon correct information as to Claimant's work at NFS from November 16, 1989 through December 5, 1989. When Dr. Pohl was advised that Claimant had worked at NFS for three (3) weeks as opposed to several months, the doctor replied, "My opinion is that the employment at North Florida Shipyards from November 15th to December 6th had **little effect** on his left knee condition." While the doctor did not "know if anything is impossible," he did testify thusly: "My feeling is that the overall natural history of his left knee problem would likely not have been altered in any **substantial** way by his employment for those three weeks," the doctor concluding, "It (those three weeks) was not material." (Emphasis added) (ALJ EX 8 at 4-8)

With reference to Claimant's right hip problems, Dr. Pohl replied, "**The answer to your question is that the employment (at NFS) would not have had any effect as you stated the question.**" (Emphasis added) (ALJ EX 8 at 10)<sup>3</sup>

Dr. Pohl examined Claimant on May 15, July 26 and August 23, 1989 and during those visits **there were no complaints about any right hip problems**, and his complaints were limited to both knees, his elbow and feet. Dr. Pohl reviewed Dr. Gaillard's office notes

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<sup>3</sup>The doctor's opinion as stated in this context will be given little or no weight because the hypothetical question asked the doctor to assume that **Claimant suffered from hip pain prior to his employment with North Florida Shipyards and if you assume that he did not sustain trauma at North Florida Shipyards** (ALJ EX 8 at 10, lines 8-14), and those assumptions are erroneous and not based on the evidence in this closed record.

and the first reference to right hip problems is the December 8, 1989 note wherein the doctor took complaints of right hip and groin pain for the previous two weeks, which pain was "much worse this morning." (ALJ EX 8 at 13-14) Dr. Gaillard next saw Claimant on December 27, 1989, at which time "the patient still is having trouble with his right hip. He complains of severe pain in this area. He states he remembers now that a short time before the pain started he was in the stairway or passageway on the Ship and hit the hatch with that area." On January 4, 1989 (sic) the symptoms continued and Dr. Gaillard referred Claimant to Dr. Pohl. The doctor examined Claimant on January 11, 1990 and Dr. Pohl recommended a total right hip replacement because of, and to relieve, the significantly increased right hip pain, and the surgery took place on January 30, 1990. Dr. Pohl replied in the negative when asked whether or not there was any indication of the need for a total right hip replacement prior to that examination on January 11, 1990, a most important response herein. (ALJ EX 8 at 14-15)

The diagnosis on January 11, 1990 was severe osteoarthritis of the right hip and when Dr. Pohl was asked a proper hypothetical question, **i.e.** a question based upon facts in evidence when the record closes, Dr. Pohl replied, **"I have an opinion, and I feel that it aggravated his pre-existing hip condition" and contributed** to and accelerated the need for the total right hip replacement. (Emphasis added) (ALJ EX 8 at 16-18)

With reference to Claimant's left knee problems, Dr. Pohl's diagnosis as of May 15, 1989 was "patellar-femoral crepitus, and lateral compartment osteoarthritis." Dr. Pohl was then asked a proper hypothetical question relating to Claimant's work at NFS and any effect it might have had on Claimant's left knee problems, the doctor replied, **"I don't feel that it had a substantial effect"** but the doctor did opine, **"I feel that that activity (at NFS) certainly would have increased knee symptoms beyond what would have been present, say, at a sedentary level of function."** (Emphasis added) (ALJ EX 8 at 19-20)

Dr. Pohl further opined that "they (Claimant's work at NFS) probably did temporarily aggravate a situation in that knee which was already bad." While Claimant's left knee problems began with his November 4, 1972 traumatic injury at JSI and while these problems were not caused by his work at NFS, because Claimant had a fairly advanced arthritic condition when the doctor examined Claimant on May 15, 1989, Dr. Pohl opined, **"they would aggravate the symptoms. It would aggravate the knee, not the symptoms . . . (and) (m)ake it hurt."** (Emphasis added) (ALJ EX 8 at 22-23) In response to further questions dealing with the legal concepts of aggravation, exacerbation and acceleration of a pre-existing condition, Dr. Pohl opined that three months of maritime activities

is sufficient to "have some substantial effect" on his left knee but that with three weeks of such work, **"I think it's a very close call"** and the doctor agreed that those three weeks of employment did alter and aggravate or worsen the condition in Claimant's left knee. Dr. Pohl also agreed that extensive climbing by Claimant at NFS would hasten "the destructive process in the neuropathic foot" because such work activity is "an abnormal stress on those feet," the doctor agreeing that such contribution is "possible, but (he) could not define the degree." (ALJ EX 8 at 24-28)

When Attorney Boyd persisted in his questioning of the doctor by stating the correct legal standard of workers' compensation law at page 30, lines 23-25, and page 31, lines 1 and 2, Dr. Pohl, surprisingly,<sup>4</sup> replied at lines 10 through 12:

**The employment (at NFS) had nothing to do with the problems he had in the foot.**

(ALJ EX 8 at 29-30)

As of Claimant's open meniscectomy of the left knee in 1972, he had an abnormal knee and Claimant's subsequent seventeen years of physically demanding maritime activity set up a situation which was a likely progression that would go on to develop later into an arthritic condition. Moreover, Dr. Pohl agreed that the repetitive trauma over those years to Claimant's abnormal knee would further accelerate and contribute to the arthritis in that knee, an arthritic condition that "gradually developed" over those seventeen years and until December 5, 1989, at which time he stopped working, because the abnormal knee became more susceptible to further damage by virtue of the repetitive trauma. Furthermore, Dr. Pohl agreed that Claimant's heavy physical activity at JSI and NFS during 1989 "probably" contributed to the development of his arthritis in the left knee, that Claimant's limping and altered gait for the previous ten years also had an adverse effect on his right hip condition, that Claimant had significant pathology in his hip and knee when he went to work at NFS on November 15 or 16, 1989, that the hatch cowling<sup>5</sup> incident at NFS certainly could have caused the onset of increased symptoms in that hip, that Claimant, physically

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<sup>4</sup>Thus, the doctor apparently contradicted his prior testimony as summarized herein, leading this Administrative Law Judge to surmise that perhaps the doctor does not completely understand the legal principle of "aggravation" involved herein, or, giving him the benefit of the doubt, that he was not asked the correct questions on that legal principle.

<sup>5</sup>According to Claimant, that cowling weighed 600 - 700 pounds. (CNX 8 at 7)

speaking, was pretty close to the edge when he went to work at NFS and that his work at NFS pushed him over the edge, thereby resulting in the need for a total right hip replacement. (ALJ EX 8 at 31-39)

According to Dr. Pohl, Claimant had "severe degenerative changes in his (right) hip" on January 11, 1990 and these changes developed over a period of time and were longstanding. Dr. Pohl further opined that Claimant's work at NFS "did result in a hip injury that resulted in pain, which is the same pain he brought in here (on January 11, 1990) that necessitated a total hip," that Claimant "would have required a hip replacement" even if he had never gone to work at NFS, that the trauma he experienced at NFS did accelerate and hasten his need for a total hip replacement in January of 1990 but he could not rate the extent or proportion of such acceleration. (ALJ EX 8 at 40-45)

The parties deposed Dr. Robert S. Franco on December 27, 1995 (CX 3) and the doctor, a Board-Certified specialist in orthopedics and sports medicine since January of 1988, reviewed Claimant's medical records (CX 1 at 42) at the request of JSI, the doctor agreeing that Claimant first reported right hip pain to Dr. Gaillard on December 8, 1989, the onset of which pain was due to "a fall or trauma on a ship ... (when) his hip hit the hatch in that area." Dr. Franco opined that a total hip replacement is indicated whenever the patient is experiencing pain to the extent that it "limits the (patient's) activity level, the functional and recreational activities level. And when a person enters that level of pain then we consider the surgical options." When he was asked a proper hypothetical as to Claimant's hatch cowling incident at NFS, Dr. Franco opined that, "With any type of arthritic process, any type of insult to that hip would certainly exacerbate that condition" and accelerate the Claimant's need for a total hip replacement. According to the doctor, "any insult, overuse, stress (or trauma) applied to the hip is certainly one of the factors that would contribute to accelerating that process," the doctor answering in the affirmative that this incident at NFS more likely than not contributed to some extent to Claimant's present right hip condition and his overall disability because "(a)ny process which would put additional stress would only add to the acceleration of the process." (CX 3 at 4-12)

Dr. Franco further testified that Claimant's October 4, 1972 injury at JSI and the subsequent left knee lateral meniscectomy have resulted in permanent impairment of the left lower extremity and Claimant's years of bending, kneeling, squatting, prolonged standing and lifting "would rapidly accelerate this (degenerative) process to this left knee." Dr. Franco was then asked a proper hypothetical based upon Claimant's three weeks of work at NFS and the doctor replied that that level of "activity (*i.e.*, the

physically-demanding maritime employment) is totally compatible with the status of his knee which would certainly cause a deterioration and worsening of his (patellofemoral) knee problems." (CX 3 at 17-21)

With reference to Claimant's foot problems, Claimant's September 19, 1978 x-rays showed "calcaneal spurs present which is more of a chronic condition," as well as bilateral "narrowing and degenerative changes involving the first metatarsal phalangeal joint," as well as arterial calcifications which are "indicative of atherosclerosis" and is compatible with a diabetic condition. The x-rays also showed degenerative changes or osteoarthritis as joint space narrowing and osteophyte formation, sclerosis of the joint space. According to the doctor, "He basically in 1978 had showed evidence that he was starting to have wear and tear that was of a signature nature, that x-rays already started to have changes and basically often times you have changes before you have x-ray changes... In summary, he started to show a picture of wear and tear of that foot." As of September 19, 1978, Claimant had objective findings of a permanent problem in his feet "but not a permanent disability." Dr. Franco further opined that Claimant's three weeks of work at NFS would contribute to the development of his problem with his feet because "the trauma that he sustained during that job from the weight lifting, the standing, just the prolonged standing ... with jobs not as active as his cause significant deterioration both of the soft tissue and of the bone." (CX 3 at 21-25)

Dr. Franco, in explaining that deterioration, testified thusly on page 26, lines 1-14 (Emphasis Added):

**And what you see is that the man's, his activity level (was) high and the blood supply ... could not meet these demands, hence the result was that even though it was three weeks there (were) significant changes demonstrated by, one, the soft tissue and, (two), by his arthritis processes which (are) documented which actually led to several amputations of his toes. So I do believe that his activities exacerbated his condition both from a soft tissue perspective, it's documented that ultimately led to his amputations, and to a bone problem which eventually led to an accelerated arthritic picture.**

According to Dr. Franco, "But my whole point is that as we go from here to here patients become clinically symptomatic with any additional stress, any additional injury, and that was my interpretation as one, the job, and two, the injury on the job, that would cause him to become more and more symptomatic." Dr. Franco agreed that Claimant's December 29, 1989 CT scan was consistent with his complaints of pain, even without any acute

pathology, and that Dr. Grube's January 19, 1990 report reflecting "a significant flareup in his hip pain since December" (CX 5) does indicate that the problem had become more painful. (CX 3 at 33-34)

Claimant's medical records from July of 1989 to January 11, 1990 document "a deteriorative process going on" and "it wasn't getting any better." According to the doctor, "(C)ertainly the climate in the patellofemoral joint was getting worse" and it was "progressive with the rate of progression being influenced by obviously contributing factors." (CX 3 at 35-37) One of those factors is Claimant's diabetes because the "severely decreased vascular supply" to the legs is adversely affected by "any additional stress or trauma or exertion." (CX 3 at 39) Dr. Franco would defer to the opinions of Dr. Pohl because he examined Claimant before and after his employment with NFS. (CX 3 at 41)

Dr. Franco, after being asked to assume that Claimant had experienced intermittent right hip pain prior to November of 1989 and assuming the existence of a traumatic right hip injury in November of 1989, opined that if such incident increased the pain symptoms, "it would increase the indication for the need for surgery." Dr. Franco agreed that "the several months" of right hip pain referred to in Dr. Pohl's January 11, 1990 report could refer to an incident in November of 1989 which could have aggravated the pre-existing degenerative changes in the hip and that the certainly should not return to work at his former maritime employment. (CX 3 at 43-45)

Claimant was examined on May 2, 1995 at the request of Arms Insurance Services by Dr. William N. Campbell, an orthopedic surgeon, and the doctor sent the following letter to the insurance company (CNX 3):

CHIEF COMPLAINT: Right hip pain.

HISTORY OF PRESENT ILLNESS: Mr. Selvig is a 65 year-old white male with a lengthy history of multiple surgeries to his body from an orthopeadic point of view. The patient states that his present complaint relates to an accident which he thinks occurred sometime in October or November of 1989 while working for North Florida Shipyards. The patient states that he had been working there several weeks, when he was going down a stairwell on the **USS Forrestal**, when a hatch fell on his head and forced his hip down into the side of the hatch. The patient said he suffered immediate pain. The patient states, however, that he continued to work. The patient, evidently, did not seek medical help until approximately 1 1/2 to 2 months after that. The patient believes that he was seen by Dr. Gaillard, but he is not sure. Dr. Gaillard subsequently referred the patient to Dr. Pohl. Somehow, during this period, the patient was led to believe that there was some

sort of chip fracture associated with his right hip. He did not evidently, he did not improve and had total hip arthroplasty by Dr. Pohl sometime in 1990 (the patient does not recall when).

PAST MEDICAL HISTORY: The patient has had multiple orthopaedic problems in the past and multiple surgeries. He has had bilateral toe implants with the left one becoming infected and resulting in a partial amputation of the foot. He has had three surgeries to his left knee, the most recent which was a total knee replacement by Dr. Pohl in 1990. He had elbow surgery in the 1980's. He has also had bilateral herniorrhaphies and gallbladder surgery. The patient's other medical problems also indicate that he has adult-onset diabetes for approximately 4 to 5 years. He has hypercholesterolemia and hypertension...

REVIEW OF X-RAYS: The original films of January 11, 1990 indicate bilateral joint narrowing of both hips with the right being more severe than the left. There are osteophytes present at the superior aspect of the acetabulum and also at the femoral head. The joint space on the right side is about half the size of that on the left hip. There is also sclerosis of the superior aspect of the acetabulum, indicating increased stress in this region. This is also more marked on the right side.

X-RAY REVIEW, CONT'D: The rest of the films from early March 1990 until 1991 reveal an Intermedics total hip arthroplasty system with 2 screws in the acetabular shield. The alignment and position of these are excellent at the most recent films in 1991. I see no signs of loosening. There are some signs of heterotopic bone formation at the superior aspect of the acetabulum in the region of the gluteus muscles.

REVIEW OF RECORDS: Dr. Gaillard's records indicate that the patient was first seen by him on December 8, 1989. At that time, the patient complained of right hip and groin pain which had existed (according to his notes) for approximately 2 weeks. On the follow-up notes on December 27, 1989, Dr. Gaillard states that the patient "remembers now that a short time before the pain started, he was in a stairway or passageway on a ship and hit the hatch with that area". Evidently, on December 29, 1989 Dr. Gaillard ordered a CT scan which indicated severe superior and lateral narrowing of the right hip joint with sclerosis compatible with degenerative disease. Also, osteophytes were noted and a small chip off the posterior aspect of the acetabulum which is probably as a result of old trauma or osteophytic formation. The impression of the radiologist, Dr. Carter, is that the patient has moderate to severe degenerative changes without acute abnormalities of the right hip.

The patient's past history from Dr. Gaillard, and other doctors, indicates a significant history of osteoarthritis of many joints.

Dr. Grube talks about this in January 19, 1990. Dr. Gaillard has talked about it on several occasions. Dr. Pohl indicates on December 11, 1990 that the patient is in on that day for evaluation of right hip. The patient stated that he had had increasing pain of the right hip for several months. X-rays by Dr. Pohl at that time indicate severe osteoarthritis of the right hip. There is no mention in this initial contact with Pohl, who had seen him for a number of years, of any injury causing this right hip pain. The operative procedure of the total hip arthroplasty was done on January 30, 1990 by Dr. Pohl.

Dr. Campbell, after reviewing the medical records of Dr. Gaillard, Dr. Pohl, Dr. Carter (a radiologist) and Dr. Grube, gave these impressions (CNX 3 at 4):

IMPRESSION:

- 1) Multiple polyarthrititis, mostly degenerative in nature.
- 2) S/P total knee arthroplasty.
- 3) S/P bilateral first MTJ replacements with subsequent infection of the left.
- 4) Diabetes.
- 5) High blood pressure.
- 6) Severe arthrosclerotic disease.
- 7) Psychophysiologic musculoskeletal overlay.

It is intuitively obvious from the x-rays and the records provided, that Mr. Selvig had pre-existent arthritis of his right hip. AS a matter of fact, most of the records do not indicate an acute injury being the precipitating cause for his right hip. Nonetheless, the roentgenographic changes, which are so eloquently delineated on the x-rays and the CT scan, certainly pre-date any injury which may have occurred in October or November of 1989. The CT read by Dr. Carter reveals no acute abnormalities. My review of the x-rays reveals no signs of chip fractures or any other acute problems other than rather long-standing extensive degenerative changes of both hips with the right being greater than the left.

It is, therefore, my conclusion that the accident which he supposedly sustained in October or November of 1989 at the shipyard, had no impact whatsoever on the ongoing degenerative process of his right hip and the resultant requirement for total hip arthroplasty.

The parties deposed Dr. William N. Campbell on December 19,

1995 (CNX 9) and the doctor, who is a Board-Certified orthopedic surgeon, testified that he examined Claimant on May 2, 1995 at the request of the Employer, that he also reviewed Claimant's medical records and some x-rays, that Claimant was "like a demilitarized zone from an orthopedic point of view," that Claimant's doctors have "done a pretty good job of rehabbing the (right) leg," that "the hip replacement and the resultant hip had left him with a very serviceable right leg," that he "generally tell(s) most total hip patients that they probably will not be engaged in a job that we would refer to as heavy" and that he "might be able to do moderate to light duties" as long as he would be "able to move around and stand four to six hours a day." Claimant's total knee replacement would also require imposition of similar restrictions against "excessive activity," "not standing too long for him on those feet, because of the weakness of the leg, the swelling, the partial amputations, the lack of stability." (CNX 9 at 3-9)

According to the doctor, Claimant's x-rays revealed "preexisting bilateral degenerative arthritis of his hips, with the right being much more severe on the left," and his December 29, 1989 CT scan of the right hip "only serves to reinforce the x-rays" because, "In this particular case, x-rays are much more definitive than CTS..." Dr. Campbell took a history report of Claimant's November of 1989 hatch cowlings incident and, according to the doctor, "the accident of October (SIC) had no impact whatsoever on the ongoing degenerative process of the right hip and the result(ant) requirement of a total hip replacement, (or) arthroplasty," the doctor remarking, "Anything that occurred in the last three or four months of his period prior to the total hip surgery (was) inconsequential as to causing any additional damage to his hip or knees." Dr. Campbell was unable to express an opinion on the etiology of Claimant's problems with his feet because "(b)y the time his feet got to me, they were in such disarray as to make in very difficult" for the doctor to render an opinion on the record. (**Id.** at 10-14)

Dr. Campbell, who did not know exactly what work Claimant performed at JSI and at NFS, testified that Claimant's medical records do not reflect right hip and groin complaints prior to that December 8, 1989 report to Dr. Gaillard, that the complaints of right groin pain would be consistent with right hip problems and that the November 23, 1989 incident at NFS "may have certainly acutely exacerbated it, but it had no long-term effect upon the outcome" and "absolutely ... (t)he dye was cast" because he already had preexisting osteoarthritis in that hip, the doctor agreeing that Claimant's right hip was more symptomatic in December of 1989 than he had been previously and that the total hip arthroplasty was performed because of the level of pain he was experiencing. As Dr. Campbell has only examined Claimant once, and that was on May 2, 1995, long after the events in question, the doctor would defer to

the contemporaneous examinations and opinions of Dr. Gaillard (who saw Claimant over fifty (50) times prior to the incident in November of 1989), Dr. Pohl (who saw Claimant numerous times over a six year period) and Dr. Grube. (**Id.** at 15-23)

Dr. Campbell conceded that "any sort of activity in a guy with degenerative changes in his knees and hips will be more difficult than it would be for the average person." (**Id.** at 30) When the doctor was asked whether or not Claimant's three weeks of work at NFS had any impact on Claimant's knee condition, the doctor replied, "I think that's an impossible question to answer" because the "natural status of **homo sapiens** is you wear out," the doctor concluding, "I have an opinion that I don't think there's been any great impact as a result of that short employment period." (**Id.** at 36-39) Finally, the doctor reluctantly conceded, "... I love these possible questions... Is that possible? Sure, it is. Is it probable? No. Is it probable his knee occurred in two weeks, three weeks(?), really remote"... Same thing as I said before, anything is possible, but it is highly improbable." (**Id.**, at 40)

When Dr. Campbell was shown a list of Claimant's work activities at NFS, he described that work as "moderate to heavy duty." (**Id.** at 41) Claimant's present knee problems are the result of three surgeries to the left knee "and the activities of daily living over the last 20 years." (**Id.** at 43-44)

Counsel for NFS sent the following letter to Dr. Pohl and, in view of its importance herein in resolving the mandate from the Benefits Review Board, the letter will be quoted its entirety (CNX 10):

"This will follow our conference regarding the above referenced matter. For your review I am enclosing a copy of your earlier deposition.

"We discussed three of Mr. Selvig's conditions. Specifically, his knee, his hip and his feet. I believe that you were not provided with all of the relevant facts as of the time of your earlier deposition and that is confirmed by your current opinions. Of most importance is the erroneous fact that Mr. Selvig worked for my client, North Florida Shipyards, for three months. As we discussed, he actually only worked there from November 16, 1989 through December 5, 1989. He was laid off for reasons totally unrelated to any health condition that he may have had. We have no records of any complaint or injuries while he was on this job.

"Mr. Selvig worked at Jacksonville Shipyards (not to be confused with my client, North Florida Shipyards) from July 1967 through August 1989. He injured his left knee while working for

Jacksonville Shipyards on October 4, 1972. He ultimately had surgery performed by Dr. John Q. Thompson.

"Mr. Selvig was referred to you by Dr. Gaillard and you saw him on May 15, 1989. At that time you diagnosed severe degenerative osteoarthritis in his right elbow and his left knee. This was also to some extent in his right knee and in his feet. Ultimately the patient underwent a total knee arthroplasty on 11/6/90. I understand that it is your opinion that the left knee problem as well as the resulting disability and the need for ultimate surgeries was the result of the accident and resulting injuries which occurred at Jacksonville Shipyards in October of 1972. I understand that it is also your opinion that the condition would have been aggravated during the patient's continued work at Jacksonville Shipyards from 1972 through the time that he left that job in August of 1989. Finally, I understand that you cannot say that Mr. Selvig's employment with North Florida Shipyards in any way aggravated, accelerated or contributed to his knee condition given the fact that he only worked there for three weeks. If he had in fact worked at North Florida Shipyards for three months as earlier indicated your opinion would have been as you expressed in your deposition. However, based on the correct history of only having worked for three weeks and not having sustained any identifiable injury and having made no complaints while working at North Florida Shipyards for those three weeks, it would be impossible to link the condition in any way to that employment.

"As to Mr. Selvig's foot condition, I understand that your opinions are the same. Mr. Selvig's foot condition would have been aggravated, accelerated or contributed to by his work at Jacksonville Shipyards through the time of his departure from there in August of 1989. However, since Mr. Selvig only worked for North Florida Shipyards for three weeks, it again would be impossible to opine that there was any aggravation, acceleration or contribution to the foot condition from this employment. Again, had the period of employment at North Florida Shipyards been three months, your opinions would be expressed in your deposition.

"As to Mr. Selvig's hip condition, I understand that he first reported this to you on January 11, 1990. At that time he indicated that he had had right hip pain for the past several months although there had been hip pain for quite a while before that. On examination Mr. Selvig was found to have significant degenerative joint disease in the right hip. Mr. Selvig did not report any history of trauma or injury with respect to his hip problem. As we discussed, Mr. Selvig contends that he did injure his hip while working with North Florida Shipyards. I understand that it is your opinion that if Mr. Selvig in fact had not had any hip pain prior to his employment with North Florida Shipyards and if he did in fact sustain trauma to his hip during that employment,

then in your opinion this would have aggravated his pre-existing hip disease. On the other hand, if it is determined that Mr. Selvig did have hip pain prior to his employment with North Florida Shipyards or that he did not sustain trauma while working for North Florida Shipyards, then it would be your opinion that Mr. Selvig's hip condition would not be related to his employment with North Florida Shipyards.

"Finally, I understand it is your opinion that Mr. Selvig would be able to work full-time, light duty with appropriate restrictions if his only problems were related to his hip and knee for which you performed surgery. I understand that he has regained excellent function in both of these joints following the surgery. However, I understand that Mr. Selvig would be essentially unemployable on the basis of his foot problems alone.

"If the above facts correctly recite the substance of our conference I would appreciate it if you would please sign this letter where indicated below and return it to me in the self-addressed stamped envelope. Naturally, should you have any corrections, deletions or additions please feel free to make them."

Thereafter, on August 20, 1996 counsel for NFS sent the following letter to Dr. Pohl (CNX 10 at 4-5):

"I am writing you regarding Mr. Winslow Selvig, whom you have been treating for a number of years. You have previously spoken to Mr. Bill Beaver, of our firm, as well as Mr. Richard Stoudemire. At this time, we are submitting a petition to the U.S. Department of Labor for Section 8(f) relief. This relief will in no way affect the compensation benefits which Mr. Selvig has received or may receive in the future. This relief is similar to a worker's compensation Special Disability Trust Fund Claim, in that it's (SIC) purpose is to encourage employers to hire and maintain employees with pre-existing conditions which may have hindered their employment.

"On January 14, 1994 you assigned a 30% permanent partial disability to the left lower extremity together with a 20% permanent partial disability to the right lower extremity as a result of the total hip replacement which combined for 16% permanent partial disability to the body as a whole as consequence of the injuries and surgery to the Claimant's lower extremities. As you know in August of 1994, the Claimant underwent amputation of all remaining toes on his left foot. You performed the surgery and released the Claimant as of May 1, 1995, however at that time that you have conferenced and attended depositions with my colleagues, you had not yet assigned a permanent impairment rating as a consequence of the Claimant's loss of toes. You did opine that

Claimant had reached maximum medical improvement, however. I would appreciate it very much if you would provide me with this information, that I may file my Petition for Relief. I have provided a space below for your convenience, as well as a self-addressed, stamped envelope for your prompt response. Please note that I intend to mail out my petition on September 2, 1996 in compliance with the U.S. Department of Labor's deadline. I appreciate your expedited response. If you feel a conference with me would be helpful to you, I will be happy to set one up with you. I am looking forward to working with you again in the future."

Dr. Pohl signed the following addendum at the bottom of the letter relating to the impairment ratings, pursuant to the **AMA Guidelines**, 4th Edition (**Id.** at 5):

"57% (left foot/toes)

16% **current** permanent partial disability to the body as a whole  
AMA 4th ed.

I agree with the opinions as stated above."

The parties deposed Charles W. Ballard on March 18, 1996 (CX 20) and Mr. Ballard, who worked at NFS from 1988 through November of 1993, was hired as a leader man in the pipe shop at its maritime facility at Mayport, Florida and then two years later became assistant foreman of the fabrication shop. Mr. Ballard testified that NFS had a policy with reference to on-the-job injuries by its employees, that all employees immediately had to report any injuries "to a supervisor or to the safety department, whoever was available at the time," that the supervisor taking such report would have to fill out the appropriate injury report and that the NFS had a division in downtown Jacksonville off of Bay Street/or Talleyrand, a division at Mayport and several subsidiaries such as Thermal Engineering for insulation and Buffalo Electric for rewinding motors. (CX 20 at 3-6)

Mr. Ballard who knew Claimant from their work at JSI, testified that Claimant "was hired on in a leader man capacity to work for Sam Shieder," the foreman of the fabrication shop at Mayport, that he and Claimant spent about thirty percent of their time in the office and seventy percent on the boats, that all shipboard work "absolutely" requires climbing of several levels of ladders up/down to reach their work sites, often working in tight and confined spaces, that he, Claimant and Sam Shieder were working on one weekend on the fuel oil tanks of a vessel and that Claimant advised Mr. Ballard and Mr. Shieder as follows:

**"And Winslow came down through the pump room and came into the work area where we were and reported that the hatch had fell (SIC) on him as he was climbing down there to get to the job site and**

**reported it to me and Sam."** (Emphasis Added) (CX 20, page 12, lines 17-20)

Tim Alsten was the safety man at that time but he was not at the job site but Mr. Ballard "believe(d) Mr. Winslow went to look for him to report the accident to him" and when Claimant returned, Mr. Ballard could not recall whether "he had mentioned that he had seen him or had a chance to find the safety man to report it and get anything filled out paperworkwise." In any event, Mr. Ballard concluded,

**Whether the safety man came in and did his paperwork ... updated the access list like he was supposed to for each tank that's open and then left again, I don't know. They don't work for me, so.**

(Emphasis Added, CX 20, p. 14, lines 2-5)

Mr. Ballard, in further relating exactly what Claimant had told him, stated (Emphasis Added):

**Well, he just ... mentioned that he had fell on to (SIC) the back edge of the combing. It struck him in the side, and that's ... all he said to me.**

(CX 20, p. 14, lines 16-18)

According to Mr. Ballard, Claimant did not work the entire shift that day and worked half a day. The incident happened at the start of the shift, Mr. Ballard remarking, Claimant "may have been working in pain."<sup>6</sup> (CX 20 at 7-17)

Mr. Ballard did see Claimant working on that aircraft carrier two or three other times after the incident. He could not recall whether or not Claimant was limping at that time. On the day of the incident Claimant had to descend about forty feet to reach that tank at the bottom of the ladder. Mr. Ballard did not see to it that an accident report was filled out in connection with the incident "(b)ecause the foreman of the shop was notified" by the Claimant, Mr. Ballard elaborating that "Mr. Sam Shieder (foreman of the fab shop) was standing right next to me at the same time Winslow told me." According to Mr. Ballard, Mr. Shieder, as shop foreman, had the obligation of notifying Danny Martin, the general manager, about the injury. Mr. Ballard and Mr. Shieder are

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<sup>6</sup>Counsel's objection to that answer is overruled as it is relevant and material to the unresolved issues herein and as the objection really goes to the weight to be according to that testimony.

"friends," "play golf together," "discuss our family," but "we try not to discuss anything work-related," Mr. Ballard concluding, "Sam is a fair and honest man" but he also has a family "and he's got to make a living" and apparently the best way at NFS for supervisors to get along is to be a so-called "company man" because otherwise "you're unemployed." Moreover, **"So if Sam said that he didn't remember the incident, I figure Sam's looking out for Sam's butt, and I'll tell Sam that to his face."** (Emphasis Added) Mr. Ballard and Mr. Shieder did discuss their pending depositions and Mr. Ballard told him "I'm going to have to tell them what I saw and what was said to me and what's straight up, and that was it. We didn't get into great detail and try to see what each other remembered, no, if that's what you're asking." (CX 20 at 17-33)

Initially, I must determine whether Claimant has sustained a new and discrete injury as a result of his employment with North Florida Shipyards.

At the outset I must consider the effect of the well-recognized "Law of the Case doctrine" herein as my colleague made certain findings and conclusions and as the Board affirmed virtually all of Judge Levin's decision.

The "law of the case doctrine" is a discretionary rule of practice based on the principle that once an issue is litigated and decided, the matter should not be relitigated. **United States v. U.S. Smelting Refining and Mining Company**, 339 U.S. 186 (1950). The law of the case doctrine is not a rule of law and it merely expresses the practice of courts generally to refuse to reopen what has already been decided. **Messenger v. Anderson**, 225 U.S. 436, 444 (1912). The doctrine is a rule of procedure and does not go to the power of the Court. Therefore, a court may override a prior decision in the same case when a clearly erroneous prior decision would work a manifest injustice. **White v. Murtha**, 377 F.2d 428 (5th Cir. 1967); **Messenger, supra**.

It is axiomatic that the law of the case doctrine may only be applied when an issue has been fully litigated and decided. The law of the case doctrine is inapplicable where the Board has not addressed and considered an issue in its initial decision and order. **Jones v. U.S. Steel**, 25 BRBS 355, 359 (1992); **Vlasic v. American President Lines**, BRB No. 88-4298 (Unpublished, 2-19-93).

As noted above, the Board upheld Judge Levin's findings that the repetitive trauma injuries to the feet and knee were not work-related. The Board also affirmed Judge Levin's finding that the claim for a traumatic hip injury was time-barred under Section 13. However, the Board vacated Judge Levin's finding that the claims for acute and repetitive trauma to the hip were not work-related. The Board noted that the Administrative Law Judge must clarify on

remand whether the issue of repetitive trauma had even been properly raised at the hearing held before Judge Levin on May 8, 1997. Moreover, there was no finding by Judge Levin or the Board as to the timeliness of the claim for repetitive trauma to the hip under Sections 12 and 13.

Accordingly, my mandate on remand is to determine all issues properly raised by the parties which are necessary to a final determination. The Board directed on remand that the Court make an initial finding as to whether a claim had been presented for repetitive trauma to the hip at the first hearing. There was absolutely no question but that the Claimant asserted distinct and discrete claims for repetitive and acute trauma to the right hip. In his opening statement, Claimant's counsel explained:

there are two claims with give rise to this case. One is for a traumatic right hip injury, which occurred at the North Florida Shipyard in 1989. The second claim is for repetitive trauma to the right hip, the left knee and the feet. (CX 17 at 11)

There was also a lengthy discussion of the repetitive trauma claims at the conclusion of the first hearing, when Claimant's counsel reiterated that claims were being made in the alternative and that if the Court rejected the claim for benefits due to the acute hip injury, that North Florida should still be responsible on the basis of the claim for repetitive trauma to the "hip, knee and foot." (CX 17 at 114)

This closed record conclusively establishes, and I so find and conclude, that Claimant sustained a new and discrete injury to his right hip as a result of the repetitive trauma to that bodily part during his three weeks of work at North Florida Shipyards. In so finding, I rely upon and accept the well-recognized two-injury rule based upon the so-called "aggravation" doctrine.

The two injury rule provides that if the subsequent injury aggravated, accelerated or combined with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible. **Foundation Constructors v. Director**, 950 F.2d 621 (9th Cir. 1991); **Kelaita v. Director**, 799 F.2d 1308, 1308, 1311 (9th Cir. 1986). This rule applies even though the worker did not incur the greater part of his injury with the subsequent employer. **Foundation; Kelaita; Port of Portland v. Director**, OWCP, 932 F.2d 836 (9th Cir. 1991); **Strachan Shipping Company v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Cooper Stevedoring of Louisiana v. Washington**, 556 F.2d 268 (5th Cir. 1977), **Johnson v. Ingalls Shipbuilding, Inc.**, 22 BRBS 60 (1899). This rule also applies in identifying the responsible insurance carrier when only one

employer is involved. **Argonaut Insurance Co. v. Patterson**, 846 F.2d 71 (11th Cir. 1988).

Claimant testified credibly before me that at NFS he engaged in his usual physically-demanding work of boarding the ships, climbing ladders, crawling and kneeling in tight and confined spaces, and these were the same tasks that he had been performing for the previous almost twenty years on the waterfront. Claimant's credible testimony and this closed record, particularly the well-reasoned opinions of Dr. Pohl extensively summarized above, simply cannot support a conclusion that Claimant's right hip problem is the natural and unavoidable consequences of his work for JSI and his 1972 left knee injury, simply because he performed this physically-demanding work for three weeks, especially after he had passed a physical examination at NFS prior to being hired.

Accordingly, I find and conclude that Claimant's repetitive work activities at NFS for a three week period of time aggravated, accelerated and exacerbated his pre-existing left knee problems, thereby resulting in a new and discrete right hip injury on or about November 23, 1989.

Therefore, as Claimant sustained a new and discrete injury as a result of his work at NFS, JSI is not responsible for any of the compensation benefits awarded herein. I also note that the testimony of Dr. Campbell does not rebut the statutory presumption in Claimant's favor, as it is apparent that the doctor did not consider the effect of Claimant's work at NFS as it may have been affected by the well-settled "aggravation" doctrine.

### **Timely Notice of Injury**

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order**

on Remand); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). See also **Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

Although NFS did not receive written notice of the Claimant's injury or occupational illness as required by Sections 12(a) and (b), **i.e.**, by the Form LS-201, the claim is not barred because NFS had actual knowledge of Claimant's work-related problems and has offered no persuasive evidence to establish it was prejudiced by the lack of written notice. **Sheek v. General Dynamics Corporation**, 18 BRBS 151 (1986) (**Decision and Order on Reconsideration**), **modifying** 18 BRBS 1 (1985); **Derocher v. Crescent Wharf & Warehouse**, 17 BRBS 249 (1985); **Dolowich v. West Side Iron Works**, 17 BRBS 197 (1985). See also Section 12(d)(3)(ii) of the Amended Act.

As noted above, it is now well-settled under the Act that the notification requirements of Section 12 and the filing requirements of Section 13 do not begin to run until the employee was aware, or in the exercise of reasonable diligence or reasonable of medical advice should have been aware, of the relationship between the injury and the employment. **Bivens v. Newport News Shipbuilding and Drydock**, 23 BRBS 233 (1990); **Sheek v. General Dynamics Corporation**, 18 BRBS 1 (1985), **on reconsideration**, 18 BRBS 151 (1986). The awareness provisions of Section 12 and 13 are identical, **Bivens, supra**.

Appellate courts and the Benefits Review Board have consistently held that the one-year limit period for traumatic injuries does not commence to run until the employee reasonably believes that he has "suffered a work-related harm, which would probably diminish his capacity to earn his living. **Stancil v. Massey**, 436 F.2d 274 (DC Cir. 1970). **Brown v. Jacksonville Shipyards**, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). Generally, the date when the claimant, in the reasonable exercise of diligence, should have been aware of the work-relatedness of an injury is determined based on the medical advice he received. **Gregory v. Southeastern Maritime Co.**, 25 BRBS 188 (1991); **Grant v. Interocean Stevedoring**, 22 BRBS 294 (1989). The awareness provisions of sections 12 and 13 recognize that the harmful physical effects of an injury may not be manifest simultaneously with the occurrence of the injury. **Stancil**, at 276. This is particularly so in cases involving cumulative or repetitive trauma

or microtrauma. **Pitman, supra.**

NFS properly put into issue the timeliness of the notice and claims at the outset of the first hearing. Judge Levin did not reach these issues with regard to the repetitive hip claim because he rejected the claim as not work-related. On remand, as I have already concluded that Claimant's work activities at North Florida contributed to his hip injury, a determination must then be made as to whether the notice and claim provisions have been complied with by the Claimant.

Section 20(b) presumes that the notice of injury and the filing of the claim were timely. **Shaller v. Cramp Shipbuilding and Drydock Company**, 23 BRBS 140 (1989). Section 20(b) applies equally to Sections 12 and 13 of the Act. **Avondale Shipyards v. Vincent**, 623 F.2d 1117 (5th Cir. 1980); **United Brands Company v. Melson**, 594 F.2d 1068, 1072 (5th Cir. 1979). In order to rebut the presumption of timeliness, the employer must present substantial evidence to the contrary. **Shaller, supra.**

The presumption also applies to establishing the claimant's awareness of the work-relatedness of his injury. Therefore, the employer bears the burden of proving that a claim was filed more than the permissible period following the date of awareness of a work-related injury. **Horton v. General Dynamics Corporation**, 20 BRBS 99 (1987).

As noted above, Judge Levin found that there was no evidence of any time when the claimant should have known that his left knee and foot injuries were work-related. (CX 19 at 15) The same logic compels the same finding with regard to the claim for repetitive trauma to the hip. At the hearing held on August 3, 1999, Mr. Selvig testified that "I never heard anything about repetitive trauma from anybody, any doctor, ever." (TR 84) NFS has not presented any evidence to the contrary. Therefore, the notice and claim for the repetitive right hip injury, provided by the claimant's filing of an LS-203 in July of 1993, were timely.

Moreover, NFS had actual notice of Claimant's right hip problems in the report he orally made to Mr. Ballard and Mr. Shieder, and as the Employer failed to file the appropriate Form LS-202, as required, the Employer (NFS) has failed to establish any prejudice by the filing of the claim for benefit in July of 1993.

Accordingly, I find and conclude that Claimant has complied with the requirements of Section 12 of the Act.

## Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (1989). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the Employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

As found above in dealing with the Section 12 issue, and for the very same reasons, I find and conclude that NFS has failed to establish that the claim filed herein for repetitive trauma to the right hip was untimely.

Accordingly, I find and conclude that Claimant has complied with the requirements of Section 13 of the Act for his right hip work-related injury, **i.e.**, an injury resulting from cumulative or repetitive trauma or microtrauma.

## **Nature and Extent of Disability**

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a pipe fitter, pipe foreman, planner or estimator. The burden thus rests upon the Employers to demonstrate the existence of suitable alternate employment in the area. If the Employers do not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employers did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington**

**v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). See also **Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant had a temporary total disability from December 6, 1989 and such disability continued until he reached maximum medical improvement.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there

is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on November 5, 1991 and that he has been permanently and totally disabled from November 6, 1991, according to the well-reasoned opinion of Dr. Pohl. (CX 4)

#### **Average Weekly Wage**

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985);

**Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

A loss of wage-earning capacity is not negated herein by Claimant's layoff on December 5, 1989 as I have credited his uncontradicted testimony that he accepted "Danny's" offer to go to work for NFS, that this was a permanent job offer, that he expected to continue working until at least age sixty-five, especially as he passed a strenuous agility test given him at NFS. In this regard, see **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181 (1986).

The Act provides three methods for computing Claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. See **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). See also **Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. See **Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan, supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone, supra**. Claimant worked for the Employers in maritime employment for the pertinent weeks prior to December 5, 1989. Therefore Section 10(a) is applicable.

I note that the Claimant and NFS had stipulated at the initial hearing before Judge Levin that the average weekly wage was \$600.00 (TR 13), that Judge Levine accepted that stipulation and that such stipulation is the "Law of the Case."

### **Medical Expenses**

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary

medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, *supra*.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). As found above, Claimant verbally advised NFS of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, NFS did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as NFS has refused to accept the claim.

Accordingly, in view of the foregoing, I find and conclude that NFS is responsible for the reasonable, necessary and appropriate medical care and treatment for his right hip problems beginning on December 8, 1989, the date on which he first saw his family doctor for those problems.

Claimant also seeks an award of medical benefits from JSI for his left knee and feet problems because his seventeen plus years of work at JSI caused a steady deterioration of those problems, and I agree that such award is in order for the following reasons as a claim for medical benefits is never time-barred.

With regard to the October 4, 1972 injury to the left knee, JSI voluntarily accepted liability and paid compensation for temporary total and permanent partial disability. The last payment was made July 30, 1973 (CX 8). The Claimant then filed an LS 203 within one year of the last payment of compensation (CX 7).

All of the doctors of record concur that the Claimant's left knee problems began with the 1972 injury and subsequent surgery. They also agree that repetitive trauma sustained in the course of shipyard work from 1972 to 1989 caused steady deterioration in the Claimant's left knee. Dr. Pohl and Dr. Franco agreed that repetitive trauma over the years also contributed to the osteoarthritic injuries to the Claimant's feet and hip. Dr. Campbell offered no opinion concerning the impact of Claimant's work activities at JSI and on his hip and foot injuries.

As I have awarded Claimant permanent and total disability and against North Florida for the hip, the Claimant is barred from claiming concurrent permanency awards for the knee or feet. **Korineck v. General Dynamics Corp.**, 835 F.2d 42, 20 BRBS 63 (CRT) (2d Cir. 1987). However, an award of permanent and total disability for the hip does not bar the Claimant from an award of medical care for the knee and foot injuries. Since "the law of the case" is that the claimant did not sustain injuries to the left knee and feet at NFS, he is entitled to an award of medical benefits against Jacksonville Shipyards for medical care and treatment for these injuries based on the totality of this closed record before me.

### **Interest**

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute

and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

#### **Section 14(e)**

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted Claimant's entitlement to benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

#### **Responsible Employer**

NFS is the party responsible for payment of the benefits specifically awarded herein under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. See **Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). Compare **Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989)

The law involving injuries gradually produced by work activities not peculiar to Claimant's employment is generally known as the "aggravation or two-injury rule". **Foundation Contractors v. Director, OWCP**, 950 F.2d 621, 624 (9th Cir. 1991). Liability in cases of cumulative injury attaches on the last day of work under the injurious conditions or activities. **Pitman** at 214; **Kelaita, supra**. Therefore, the responsible employer is the claimant's employer when he sustained the last aggravation that forms the basis of the claim, without regard to the duration of the last covered employment. **Willamette Iron and Steel Co. v. Director, OWCP**, 698 F.2d 1235 (9th Cir. 1982); **Steel v. Container Stevedoring**, 25 BRBS, 210, 220 (1991), citing **Abbot v. Dillingham Marine and Manufacturing**, 14 BRBS 453 (1981). The last employer is liable if he exposed the claimant to activities which "aggravated, accelerated, or combined with claimant's prior injury" to create the claimant's resulting disability. (**Foundation Contractors** at 75)

It is indisputable that NFS was the last employer to expose Claimant to repetitive trauma to the hip. This employment, like his prior work at JSI, involved repetitive climbing, walking, bending, twisting, kneeling and crawling. That the NFS employment lasted only three weeks is of no consequence. Under the **Foundation Contractors** rule, NFS responsible for payment of medical care and indemnity resulting from the repetitive trauma hip injury, I so find and conclude.

As noted above, Claimant's last day of work at NFS was on December 5, 1989 and as NFS is now in bankruptcy proceedings, its Carrier is responsible for the compensation benefits awarded herein, as well as for the medical benefits for his right hip problems.

However, with reference to the medical benefits awarded for Claimant's left knee and feet problems, JSI is also in bankruptcy proceedings. The record reflects that Aetna/Travelers had coverage at the time of the 1972 knee injury. St. Paul had coverage from 1/1/76 through 6/30/87. CNA had coverage from 7/1/87 through 6/30/89. A Letter of Credit issued by the Department of Labor was in effect from 7/1/89 through 9/25/89. Cigna had coverage from 9/26/89 through 6/30/92; however, Cigna has been dismissed since claimant last worked for JSI before the date of the Cigna bond. These periods of coverages are set forth in SX-3. (TR 6-7)

Accordingly, the medical benefits awarded against JSI shall be satisfied out of the Department's Letter of Credit.

#### **Section 8(f) of the Act**

Regarding the Section 8(f) issue, the essential elements of

that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), rev'd and remanded on other grounds sub nom. **Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), aff'd, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, supra, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport**

**News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, *supra*.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, *see* **Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. *See* **Director, OWCP v. General Dynamics Corp. (Bergeron)**, *supra*.

In support of its petition for Section 8(f) relief, JSI has submitted the following application (CNX 20 at 9-15):

"This case presents clear evidence that Selvig was suffering from pre-existing permanent partial disabilities to his left knee and both feet, which were made more debilitating by his longstanding history of hypertension and diabetes mellitus, prior to ceasing work with the employer in August of 1989. (footnote omitted) The medical records attached hereto clearly establish a chronicity of complaints regarding Selvig's problems in his left knee and both feet which began in the 1970's. In addition, Selvig's arthritic changes in his feet were complicated by his hypertension and diabetes mellitus, ultimately resulting in amputations of his left toes. (footnote omitted) Indeed, orthopedic surgeon Robert S. Franco opined that, after Selvig's left lateral meniscectomy in 1972, Selvig had a permanent

disability to his left knee that would be ratable under the AMA guidelines. Additionally, Selvig testified that he was working with continued pain in his left knee and feet since the 1970's.

"JSI may also meet its burden of showing the existence of a pre-existing permanent partial disability by showing that

[t]he employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

**Lockheed Shipbuilding v. Director, OWCP**, 951 F.2d 1143, 1145 (9th Cir. 1991); **citing C & P Telephone Co. v. Director, OWCP**, 564 F.2d 503, 513 (D.C. Cir. 1977); **see also, General Dynamics Corp.**, 982 F.2d at 797. JSI has clearly met this standard in light of the fact that Selvig sustained injuries and underwent surgery to his left knee and feet in the 1970's and continued to experience pain in these areas thereafter.

"Prior to leaving the employer in August of 1989, Selvig was an individual who had a seventeen (17) year history of chronic pain in his left knee and problems in both feet which were complicated by hypertension and diabetes mellitus. The case law is clear that hypertension and diabetes mellitus can be pre-existing conditions for purposes of Section 8(f) relief under the Act. **Nacirema Operating Co., Inc. v. Benefits Review Board**, 538 F.2d 73 (3d Cir. 1976); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Henry v. George Hyman Construction Co.**, 21 BRBS 329 (1988). It goes without saying that a cautious employer would have been strongly motivated to discharge Selvig in light of his numerous, chronic, severe pre-existing conditions. Likewise, a cautious employer would not have been motivated to hire Claimant, with his multiple medical problems, but for the limiting provisions of Section 8(f) of the Act.

"Regardless of whether Selvig is determined to be partially or totally disabled, the contribution requirement of entitlement to Section 8(f) relief has been met herein. Initially, Selvig's left knee condition and problems with both of his feet are clearly contributing to his current disability. This is evidenced by the fact that Selvig is seeking a permanent total disability based on these conditions, in addition to his hip condition which is unrelated to his work with JSI. This is also evidenced by the fact that, although Selvig suffered from pre-existing disabilities to his left knee and both feet which were complicated by his hypertension and diabetes mellitus since the 1970's, he was able to work with JSI up until he was laid off in August of 1989. Since then, Selvig has allegedly not been able to work other than his

term of employment with North Florida Shipyards in 1989. In addition, JSI has met the "materially and substantially greater" ultimate disability prong of Section 8(f) with the opinions of Drs. Pohl and Franco. (Exhibits D and Q, respectively)

"Dr. Pohl treated Selvig on numerous occasions for his alleged orthopedic injuries to his left knee and feet. Dr. Pohl opined that Selvig's 1972 injury to his left knee and accompanying surgery contributed to his development of osteoarthritis in his left knee which ultimately led to his surgeries and his total left knee replacement. (Exhibit D, pp. 12-14) While discussing Selvig's 1972 left lateral meniscectomy, Dr. Pohl explained that "the cartilage has important functions in the knee and the surgical removal of a torn cartilage will lead to the onset of arthritis in it..." (Exhibit D, p. 12) Dr. Pohl also opined that Selvig sustained repetitive traumas in the course of his employment from his 1972 injury until leaving JSI in August of 1989. Dr. Pohl opined that these repetitive traumas contributed to the development of Selvig's severe osteoarthritis in his left knee which eventually required a total knee replacement. (Exhibit I, Exhibit D, pp. 13-14) Additionally, Dr. Franco opined that the repetitive activity in which Selvig engaged from 1973 through 1989 while employed with JSI combined with the disability which Selvig had following his left knee surgery in 1972 to create a greater overall disability than the disability which would have resulted solely from the alleged repetitive traumas alone. (Exhibit P, pp. 15-16)

"Dr. Pohl also opined that Selvig's moderately severe diabetic neuropathic foot condition, which ultimately resulted in amputation of the toes on Selvig's left foot, was hastened and aggravated by the repetitive traumas sustained while working with JSI. (Exhibit 3, p. 22) Common sense dictates that Selvig's pre-existing diabetes mellitus and pre-existing feet problems combined with his alleged repetitive traumas to his feet suffered while employed with JSI to result in a materially and substantially greater overall disability to his feet. **Burch v. Superior Oil Co.**, 15 BRBS 423 (1983). It is also clear that the problem with Selvig's feet combined with his diabetes mellitus, hypertension, and left knee problem to produce a materially and substantially greater overall disability than that disability which would have resulted from the alleged repetitive traumas alone.

"The medical opinions of Drs. Pohl and Franco clearly establish that Selvig's current disability is a result of the combination of his longstanding history of diabetes mellitus and hypertension, his moderately severe degenerative arthritic problems with his feet, and his 1972 left knee injury with the alleged repetitive traumas which Selvig continued to suffer to his feet and left knee up until leaving his employment with JSI in August, 1989. The doctors' opinions also prove that Selvig's current disability

is materially and substantially greater than that disability which would have resulted from the alleged repetitive traumas alone. Therefore, the uncontroverted medical evidence clearly demonstrates that JSI has satisfied the contribution requirement for Section 8(f) relief, regardless of whether Selvig is eventually adjudicated to be permanently and totally disabled or permanently and partially disabled.

"Lastly, the requirement that Selvig's pre-existing disability be manifest to JSI has also been met. In fact, the 1972 injury which necessitated Selvig's first left knee surgery occurred while Selvig was employed with JSI in the course and scope of his employment with the company. JSI not only knew about this injury, but it reimbursed Selvig for lost wages and paid the physicians who treated him for his left knee condition. In addition to JSI having actual knowledge of Selvig's pre-existing left knee disability, the medical records and depositions attached hereto combine to meet the requirements of making all of Selvig's pre-existing disabilities manifest to JSI. The courts have consistently held that, even absent the employer's actual knowledge, a condition can be considered "manifest" if it was diagnosed and identified in medical records. **White v. Bath Ironworks Corp.**, 812 F.2d 33, 35 (1st Cir. 1987) (**citations omitted**). The exhibits attached hereto clearly diagnose Selvig's pre-existing permanent disabilities to his left knee and both feet. In addition, the medical records repeatedly document Selvig's longstanding history of diabetes mellitus and hypertension which significantly aggravated his foot condition and contributed to his current disability. In the final analysis, JSI is clearly one

of those who knew that the disability is permanent or who are uncertain, but have objective evidence of a serious and lasting problem that would motivate a cautious employer to discharge (or not hire) the employee because of a greatly increased risk of liability.

**General Dynamics Corp.**, 980 F.2d at 83. In light of the foregoing, Selvig's aforementioned pre-existing permanent partial disabilities were, in fact, manifest to JSI prior to Selvig being laid-off in August of 1989," according to counsel for JSI.

Counsel for the Director opposes the Employers' application for Section 8(f) relief on both procedural and substantive grounds, especially as counsel for NFS has taken "several positions in the brief (which) are inconsistent with any such claim" and as the "possible application of Section 8(f) is also foreclosed by the findings in the Board decision." (DX 1)

I disagree as Jacksonville Shipyards and Arm Insurance Services raised the issue at the informal conference and then

District Director N. Sandra Ramsey, in her July 29, 1994 transmittal memorandum to the Office of Administrative Law Judges (CNX 21), advised that "Section 8(f) has been raised prematurely" and the "Employer's right to later seek Section 8(f) relief is herewith preserved." Moreover, it is not unusual for an Employer to take inconsistent positions at the hearing with reference to Section 8(f) relief due to the Employer's unwillingness to accept and stipulate to permanent total disability.

Dr. Philip P. Gaillard is Claimant's family physician and his medical records, in evidence as CX 15, total 90 pages. Those records begin on November 9, 1987 and detail treatment for Claimant's various medical problems, including diabetes, hypertension, a bladder tumor, prostatic hypertrophy, allergic reactions to prescribed medication, the usual coughs and colds, swelling of hands and face, suspected asbestosis as of April 26, 1988, a markedly positive exercise treadmill test at a low level of exercise on May 3, 1988, a test terminated due to fatigue and EKG changes, bilateral arthritis of the feet as of November 22, 1988, gastrointestinal problems, post-traumatic osteo-arthritis of the right hand as of April 4, 1989, bursitis of the left shoulder as of ?/18/89, on November 15, 1989 Claimant was given a note permitting him to work at a shipyard, right hip and groin pain on December 8, 1989 for the prior two weeks, which pain was "severe" on December 27, 1989, a CT scan of the right hip was prescribed and Claimant was referred to an orthopedist for further evaluation. The December 29, CT Scan showed "moderate to severe degenerative change without acute abnormalities," that change was upgraded to "severe" on January 17, 1990; "severe osteoarthritis" in his left knee, a lump in his left chest was reported on June 26, 1991, bilateral shoulder arthritis/bursitis, right leg vascular problems were reported on November 24, 1992, as well as referral to numerous specialists for further evaluation, consultation and treatment, according to Dr. Gaillard.

On the basis of the totality of the record, I find and conclude that NFS has satisfied these requirements. The record reflects (1) that Claimant has worked as a longshoreman for almost twenty years, (2) that he has sustained previous work-related industrial accidents to his left knee and both feet prior to his last day of work on December 5, 1989, (3) while working at the Employers' shipyard and (4) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, the above enumerated medical problems as reported by Dr. Gaillard, as well as the orthopedic injuries Claimant sustained at JSI) and his final injury on December 5, 1989 as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability. **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on December 5, 1989, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the

employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams, supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper, supra**, at 286.

Moreover, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, *ipso facto*, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); *aff'd*, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, *viz*, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), *aff'g*, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee."

**Sacchetti, supra**, at 681 F.2d 37.

As noted above, NFS has satisfied the tri-partite requirements for Section 8(f) relief and is entitled to the limiting provisions of Section 8(f) of the Act.

#### **Attorney's Fee**

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against NFS and JSI. Claimant's attorney timely filed his fee petition on November 8, 1999 and, at the request of counsel for CNA Insurance Company, this Court shall defer ruling on that fee petition until such time as Attorney Neusner resubmits his fee petition and apportions his services relating to Claimant's right hip problems and those relating to his left knee and bilateral feet problem. The fee petition, once apportioned, shall be submitted to the appropriate counsel relating to that particular claim.

Claimant's attorney shall resubmit fee applications concerning services rendered and costs incurred in representing Claimant between June 16, 1994, the date of the informal conference and until the Decision and Order of Judge Levin and after April 29, 1999, the referral date of the claim filed by Claimant in OWCP No. 6-10511. Services rendered outside of these dates should be submitted to the District Director for her consideration. The fee petitions shall be filed within thirty (30) days of receipt of this decision and copies must be sent to the appropriate opposing counsel who shall then have fourteen (14) days to comment thereon.

#### **ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. NFS and its Carrier (Respondents) shall pay to the Claimant compensation for his temporary total disability from December 6, 1989 through November 5, 1991, based upon an average weekly wage of \$600.00, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on November 6, 1991, and continuing thereafter for 104 weeks, the Respondents shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of \$600.00, such compensation to

be computed in accordance with Section 8(a) of the Act.

3. After the cessation of payments by the Respondents, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. Interest shall be paid by the Respondents and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related right hip problems referenced herein may require, beginning on December 8, 1989, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

6. Jacksonville Shipyards, Inc., (JSI) a putative self-insurer under the Act but which, in fact, did not have appropriate coverage under the Act from July 1, 1989 through September 25, 1989, shall authorize and pay for such reasonable, necessary and appropriate medical care and treatment as is required by Claimant's left knee and bilateral feet problem, subject to the provisions of Section 7 of the Act.

7. However, in the event that JSI defaults in its obligations under this **ORDER**, the Director, OWCP, as the representative of the Department under the Act, and pursuant to Section 18 of the Act, shall authorize and pay for such reasonable, necessary and appropriate medical care and treatment as is required by Claimant's left knee and bilateral feet problem, and such expenses shall be paid out of the Letter of Credit referred to above. (CX 23)

8. Claimant's attorney shall resubmit, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to appropriate Respondents' counsel who shall then have fourteen (14) days to

comment thereon. This Court has jurisdiction over those services rendered and costs incurred for those time periods specifically enumerated above.

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**DAVID W. DI NARDI**  
Administrative Law Judge

Dated: January 10, 2000  
Boston, Massachusetts  
DWD:dr